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Supreme Court of the United States

OCTOBER TERM, 1957

No. [illegible]/3

FEDERAL HOUSING ADMINISTRATION,
APPELLANT,

vs.

THE DARLINGTON, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

Filed November 27, 1957

Probable jurisdiction noted January 27, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 628

FEDERAL HOUSING ADMINISTRATION,

APPELLANT,

vs.

THE DARLINGTON, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

THE DARLINGTON, INC., *Plaintiff*,

vs.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Amended Complaint—Filed March 10, 1955

The plaintiff complaining of the defendant alleges:

FOR A FIRST CAUSE OF ACTION

1. The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of South Carolina, with its principal office located at Charleston, S. C., and is the owner of a twelve story apartment building situate in Charleston County at the northwest corner of King and Mt. Pleasant Streets, said building being generally known as The Darlington; that the defendant Federal Housing Administration, has insured the mortgage in existence over said premises.

2. The defendant is an agency created by Act of Congress, engaged in the business of insuring mortgages; and maintains offices and agents in the City of Columbia, in the Eastern District of South Carolina; does business in Charleston County, South Carolina; and is subject to suit in this Court under Title 12 USCA Section 1702.

3. This action arises under Title 12 USCA Sections 1702-1743 and Title 28 USCA Sections 2201-2202, in that the defendant, under the guise of law but without legal justification, seeks to impose upon the plaintiff illegal, unwarranted and unjustified restrictions in the operation of its apartment building hereinafter referred to, and has threatened legal action against the plaintiff unless plaintiff yields to the defendant's illegal and unjustified demands; that plaintiff cannot yield to the illegal and unjustified demands of the defendant without irreparable loss and permanent injury, and the plaintiff

has no other complete and adequate remedy at law other than this action seeking to have this Court determine and declare the respective legal rights of the parties hereto, all as is more fully set out herein below.

4. That prior to the execution of the note and mortgage hereinafter mentioned; the Federal Housing Administration, pursuant to its statutory authority, and in accordance with the instructions of the President of the United States, conducted an extensive promotional campaign for the purpose of inducing private investors, builders and developers to undertake the construction of housing projects and apartment projects under Title VI, Section 608 of the National Housing Act, and in the course of such campaign did, among other things, invite the sponsors of the plaintiff corporation, along with numerous other persons, to a public meeting held in the City of Columbia, South Carolina, for the purpose of promoting housing projects and apartment projects, to be built in the State of South Carolina under the provisions of Title 12 USCA Section 1743, commonly referred to as Title VI Section 608 of the National Housing Act; that the said meeting was presided over by the South Carolina Director of the Federal Housing Administration, and was addressed by important officials and representatives of the Washington Office of the Federal Housing Administration.

5. That upon the basis of the Federal Housing Administration's surveys, estimates and appraisals of the need of and demand for such a project at such location, and the cost of organizing, constructing and operating such a project at such location, and in reliance upon and by reason of the promotional statements and tactics used by the Federal Housing Administration, its authorized officers and agents, the plaintiff corporation was promoted by the Federal Housing Administration to undertake the construction of a 608 apartment project in Charleston County, South Carolina, known as The Darlington, in connection with the cost of construction of said building, the mortgage mentioned hereinafter was given as security.

6. That the sponsors of the plaintiff corporation were the owners of a valuable tract of land in the County of

Charleston, South Carolina, immediately adjacent to and adjoining the corporate limits of the City of Charleston, located at a point which has been determined to be the geographic center of population of the metropolitan area of the City of Charleston, which was approved and designated by the Federal Housing Administration as a proper site for the construction of The Darlington Apartments; that situated on said lands were buildings and structures housing a super-market, furniture store, restaurant, physicians offices, said buildings and structures being conservatively valued at the sum of Seventy Thousand ($70,000.00) Dollars; that the sponsors of the plaintiff corporation, due to the promotional efforts of the Federal Housing Administration, deeded said tract of land to be used as the site for the apartment project proposed to be constructed, and destroyed and removed therefrom the buildings and structures thereon; that after the destruction and removal of said buildings and structures therefrom, said tract of land itself was conservatively appraised by the Federal Housing Administration at a reasonable value of One Hundred Twenty-five Thousand ($125,000.00) Dollars.

7. That the plaintiff corporation at the solicitation and by the promotion of the Federal Housing Administration, and at great expense to its sponsors, was organized and incorporated for the purpose of constructing and operating said apartment project; that such organization and incorporation was minutely and extensively controlled under the direction of the Federal Housing Administration, and plaintiff corporation was required to secure a charter in the form supplied and required by the Federal Housing Administration.

8. That acting on and in reliance upon the representations and obligations of the Federal Housing Administration, plaintiff corporation executed and delivered to Echo Fire and Title Insurance Company, Charleston, South Carolina, its mortgage together with its note secured thereby, dated December 7, 1949, and recorded in the office of the Register of Mesne Conveyances for Charleston County, S. C. on December 30, 1949 at 11:25 A.M.; that said mortgage and said note provide for the payment of the principal sum

of One Million Three Hundred Fifty-Seven Thousand Seven Hundred ($1,357,700) Dollars with interest from the date thereof at the rate of four (4%) per cent per annum and further provides for payment of interest alone payable monthly on the first day of January 1950 and on the first day of each month thereafter up to and including May 1951; and further provides that commencing on the first day of June 1951, installments of interest and principal shall be paid in the sum of Six Thousand Two Hundred Twenty-two and 79/100 ($6,222.79) Dollars each, such payments to continue monthly on the first day of each succeeding month until the entire indebtedness has been paid.

9. That said mortgage covered the tract of land referred to in paragraph 6 hereinabove, together with the
6 improvements, namely the contemplated apartment building to be constructed under the provisions of Title 12 USCA Section 1743, commonly referred to as Title VI Section 608 of the National Housing Act.

10. That the Federal Housing Administration duly insured the payment of the mortgage to the legal owner thereof.

11. That Institutional Securities Corporation of New York, N. Y. is the present owner and holder of said mortgage and said note.

12. That at the solicitation and promotion of the Federal Housing Administration, and pursuant to and in reliance upon the representations, promises and agreements made by the Federal Housing Administration, the charter of incorporation of plaintiff corporation, and the note and mortgage referred to hereinabove, plaintiff corporation commenced construction of said apartment project known as The Darlington consisting of a twelve-story apartment building, containing several store spaces on the ground floor, with penthouses on the roof, and containing 156 apartments, completing said construction during the month of July 1951 at a total cost to plaintiff's sponsors of One Million Five Hundred Fifty Thousand, Nine Hundred Twenty and 11/100 ($1,550,920.11) Dollars exclusive of the value of the tract of land deeded by the plaintiff's

sponsors as referred to hereinabove to the plaintiff corporation.

13. That since the completion of said apartment house project, plaintiff corporation has made every effort to secure tenants for said apartment project on the basis of leases or occupancy of a month or more, although said project was and still is operating at a loss, the plaintiff has continued to operate said project and to make the required regular monthly payments on principal and interest on said mortgage and note at a great financial loss and sacrifice to itself, and has never defaulted in any payment due on said mortgage.

7 14. That although said project has operated at a financial loss, plaintiff was required to pay and did pay during the period from December 1951 through January 1955 to the said mortgagee, principal payments in the sum of Eighty Thousand Two Hundred Eighty-three and 51/100 ($80,283.51) Dollars; interest payments in the sum of One Hundred Sixty-six Thousand Two Hundred Twenty-five and 14/100 ($166,225.14) Dollars; deposits for replacement reserve in the sum of Fifteen Thousand Eighty-two and 96/100 ($15,082.96) Dollars and has paid to the Federal Housing Administration the sum of Twenty-one Thousand Five Hundred Ninety-eight and 78/100 ($21,598.78) Dollars as Federal Housing Administration mortgage insurance premiums, and in addition has during said period of time paid real estate taxes in the sum of Thirteen Thousand Seven Hundred Ninety-six and 40/100 ($13,796.40) Dollars; and premiums on hazard insurance in the sum of Eight Thousand Nine Hundred Seventy and 46/100 ($8,970.46) Dollars all in accordance with and as required by said mortgagee, all of said items totaling the sum of Three Hundred Five Thousand Nine Hundred Fifty Seven and 25/100 ($305,957.25) Dollars.

15. That as hereinabove stated, plaintiff has even since completion of said project in July 1951, made every effort to secure tenants for the 156 rental units in said apartment project on the basis of leases or occupancy for the period of a month or more, but was unable to secure sufficient tenants on said basis to make said project self-sustaining,

but nevertheless plaintiff corporation continued to meet its obligations under said mortgage; that in a further effort to secure tenants for said apartment project on said monthly basis or longer plaintiff corporation during October or November of 1951, being without funds with which to purchase furniture to furnish any of the said apartments, and being prohibited by its corporate charter from purchasing furniture and giving a mortgage over the furniture to secure the purchase price thereof, the plaintiff persuaded one of the sponsors of the plain-
8 tiff corporation, to purchase furniture for the furnishing of some of the apartments, and to lease to the tenants of the plaintiff corporation who desired furnished apartments the furniture at a monthly rate in accordance with the formula established by the Federal Housing Administration, the plaintiff agreeing to act as agent for the sponsor of plaintiff corporation in the collection of the furniture rent from the tenants, and to remit to the sponsor all furniture rent thus collected.

16. That in spite of all of plaintiff's efforts to secure tenants on a monthly basis or longer for the furnished apartments, the aforementioned vacancy problem continued to exist, although alleviated to a certain extent by such efforts of plaintiff corporation, and plaintiff was never able to secure sufficient tenants on said monthly basis of either furnished or unfurnished apartments to place such apartment project on a self-sustaining basis.

17. That although the demand for month to month tenants or for a longer period than a month in the area served by such apartment project was and is inadequate to provide sufficient tenants for such project, there has existed throughout the times herein mentioned in the area served by such project, an unsolicited demand for furnished rental units for terms of less than thirty days, and by reason of the location, design and convenience of such apartment project, it has attracted numerous unsolicited applicants for occupancy of furnished apartments on terms of less than thirty days.

18. That by reason of the number of apartments in such project which remained vacant month after month, and

the impossibility of securing tenants for such vacant apartments, furnished or unfurnished, for terms of thirty days or more, and by reason of the demand for and availability of such vacant furnished apartments for terms of less than thirty days, and by reason of the fact that the ex-
9 pense of operating said project continued to vastly exceed the income therefrom, plaintiff corporation in a further effort to keep the mortgage from being foreclosed, and to secure revenues sufficient to meet monthly mortgage payments and expenses, did on or about the first day of February 1952, begin to accept applications for such vacant furnished apartments for terms of less than thirty days.

19. That the rental of furnished apartments for terms of less than thirty days has increased the revenues from the operation of such project, and has reduced in a measure the operating loss of such apartment project, and unless such practice is permitted to continue, plaintiff corporation will be forced to default on the payments called for by the mortgage. The mortgage will be foreclosed and the plaintiff will lose its valuable investment in such project, to the irreparable damage and injury to the plaintiff.

20. That the plaintiff corporation has at all times since the completion of the building kept and had available more than an adequate number of apartments for the demand for occupancy for terms of thirty days or more, and has never refused any applicants for monthly or longer occupancy of its apartments; and that the plaintiff corporation has always been and is now ready and willing to rent all of the apartments in said building for terms of thirty days or more and to give preference to veterans in so doing; that at the present time of the total of 156 apartments in the said building, only 141 are occupied; 124 being rented for terms of thirty days or more and 17 for terms of thirty days or less; that of the said 124 units rented for periods of thirty days or more, 73 of the apartments are occupied by men actually now engaged in the military service; that 24 are occupied by veterans of the military service.

21. That the Federal Housing Administration through its duly authorized officers and agents, has attempted to

force the plaintiff to cease its practice of renting any apartment in such apartment project for a term of less than thirty days, as will appear by reference to the letter of the Federal Housing Administration, Columbia, S. C. dated January 4, 1955, signed by W. E. Moore, Director, and addressed to the plaintiff corporation, which said letter is incorporated herein by reference a copy of same being attached hereto and marked "Exhibit A".

22. That in fact, the plaintiff rents apartments for terms of less than thirty days only for the purpose of reducing the operating loss due to a high vacancy rate and in order that the plaintiff may meet its monthly payments under the aforementioned mortgage, prevent the mortgage from being foreclosed and to save the Federal Housing Administration from any loss under its contract of mortgage insurance, as is shown by plaintiff's letter of January 10, 1955, signed by T. E. Steadman, Secretary of the plaintiff corporation, and addressed to the Federal Housing Administration, Office of the Director, Columbia, S. C., in answer to the defendant's letter above referred to in Paragraph 21, which said letter is incorporated herein, and made a part hereof by reference, a copy of same being attached hereto and marked "Exhibit B".

23. The Federal Housing Administration, as shown by its letter of January 18, 1955, from its Washington Headquarters signed by the Deputy Assistant Commissioner, addressed to the plaintiff, which said letter is incorporated herein and made a part hereof by reference, a copy of same being attached hereto and marked "Exhibit C", has taken the position under the purported authority of a new law known as the Housing Act of 1954, Public Law 560—83rd Congress Chapter 649—2nd Session, H. R. 7839 Section 513, that it is not permissible for plaintiff to rent any units in its apartment project for terms of less than thirty days. The Federal Housing Administration has construed plaintiff's practice of renting a small portion of its apartments for terms of less than thirty days, as shown by "Exhibit C", as a violation of a new law—The Housing Act of 1954, and has ordered plaintiff to cease said practice under pain of civil and criminal prose-

cution by the United States Department of Justice, and has otherwise threatened plaintiff and is interfering with and hindering the plaintiff corporation in its operation of such apartment project to its irreparable injury and damage.

24. Plaintiff further alleges that the apartment project in question was organized, financed and constructed at the special instance, request, solicitation and promotion of the Federal Housing Administration under and by virtue of the provisions of the National Housing Act then in existence, Title 12 USCA Section 1743, commonly known as Title VI Section 608 of such Act; and neither at the time of plaintiff's incorporation, nor at the time of insurance of the loan and the mortgage on its project by the Federal Housing Administration, was there any provision in such act or in any other statute, rules and regulations of the Federal Housing Administration, plaintiff's charter, or in any agreement to which plaintiff was a party which prohibited plaintiff from renting or in anywise limiting plaintiff's right to rent apartments in its project for terms or periods of less than thirty days; that the only limitation or restriction with respect to terms or periods of renting being a provision in plaintiff's charter of incorporation prohibiting it from renting any apartment for a period in excess of three years.

25. Plaintiff avers that the right to rent apartments in its project for terms of less than thirty days is a right which plaintiff acquired and was exercising prior to the enactment of the Housing Act of 1954, and is a vested right which is protected by the Constitution of the United States. Further, that any infringement of said right would be an impairment of its right to contract.

26. Plaintiff further avers that The Housing Act of 1954, enacted August 2, 1954, under which the Federal Housing Administration seeks to interfere with the operations of plaintiff's Building, has no applicability to the plaintiff corporation or its Building, and that the application of the provisions of such Act to the operation of such building so as to prohibit plaintiff from renting, or limit its right to rent living units in said

building for terms or periods of less than thirty days would be to deprive plaintiff of its vested property rights without due process of law, and would in effect constitute a taking of private property without just compensation in violation of the Fifth Amendment of the Constitution of the United States; further, that said amendment is discriminatory and unjust and repugnant to the principles of equity and good conscience.

27. That the size and design of the plaintiff's building was determined by the Federal Housing Administration as far as plaintiff is aware, upon the basis of research, appraisals and surveys of the need for such housing in the area served by such building, made by the Federal Housing Administration; that such apartment project was constructed by the plaintiff corporation in strict accordance with plans and specifications designated and approved by the Federal Housing Administration and under the supervision, inspection and direction of the Federal Housing Administration at a total cost to the plaintiff corporation of One Million Five Hundred Fifty Thousand Nine Hundred Twenty and 11/100 ($1,550,920.11) Dollars, which exceeded Federal Housing Administration's estimate of cost by One Hundred Sixty-seven Thousand One Hundred Thirty-seven and 11/100 ($167,137.11) Dollars exclusive of the land valued at One Hundred Twenty-five Thousand and no/100 ($125,000.00) Dollars, or an investment of plaintiff in the project as of date of completion of Two Hundred Ninety-two Thousand One Hundred Thirty-seven and 11/100 ($292,137.11) Dollars.

28. That in connection with such construction of the plaintiff's building, the plaintiff has paid many thousands of dollars in fees to the Federal Housing Administration, including but not limited to a commitment fee of One Thousand Nine Hundred Ninety-five and 60/100 ($1,995.60) Dollars; inspection fees of Six Thousand Seven Hundred Eighty-eight and 50/100 ($6,788.50) Dollars; first year's mortgage insurance premiums Six Thousand Seven
13 Hundred Eighty-eight and 50/100 ($6,788.50) Dollars; that the plaintiff corporation has paid and continues to pay installments to the mortgagee hereinabove mentioned as follows:

Interest	4,264.58
Principal	1,958.21
Tax deposits	371.96
Mutual Mortgage insurance premium	523.51
Reserves for replacement	342.75
Hazard insurance premiums	201.57

or a total per month of $7,662.58 to the mortgage alone, not including costs of operating said project.

29. That since the completion of said project plaintiff has operated same, and continues to operate same principally for residential use in that it has never held its building out as a commercial or transient or tourist hotel, and has never advertised its building as such; plaintiff further alleges that it has occasionally accepted unsolicited tenants for terms of less than thirty days in an effort to alleviate the serious vacancy problem hereinabove referred to, but that such tenancies comprise only a small fraction of occupancy of said apartment project, which is estimated by plaintiff to average approximately 8% of the total number of the apartments in plaintiff's building.

30. That defendant has shown by Exhibits A and C, hereto attached, followed a course of hindering, hampering and interfering with plaintiff's management and operation of such project, has threatened civil and criminal action against plaintiff, is attempting to force plaintiff to cease the practice of renting any of its apartments for terms of less than thirty days, to force plaintiff to operate at a loss, to cause the mortgage over plaintiff's building to be foreclosed, all to the plaintiff's great loss and damage; that if defendant is permitted to continue in its course it will be impossible for plaintiff to operate said project at a profit, or even reduce or minimize its losses, and plaintiff corporation will be forced to default in the pay-
14 ments on the mortgage, and plaintiff will lose its valuable investment in such project, and plaintiff corporation and its sponsors will be irreparably damaged thereby; that such controversy involves an actual dispute upon a question of law; that the plaintiff corporation has no other adequate remedy other than this action.

31. That an actual controversy of a justiciable nature exists between plaintiff corporation and the Federal Housing Administration involving the laws of the United States, their respective rights, privileges, duties and responsibilities under and by virtue of the promises, representations, commitments and agreements between them, and the mortgage hereinabove referred to, which controversy should be determined by a judgment of this Court in this action.

FOR A SECOND CAUSE OF ACTION

1. Plaintiff here reiterates all of the allegations contained in the first cause of action as fully as if here repeated in detail.

2. Plaintiff further alleges that, by reason of the negotiations, promises, representations and agreements made to the plaintiff by the duly authorized officers and agents of the Federal Housing Administration, the plaintiff's acceptance of same, and plaintiff's acting in reliance upon same, in constructing and operating said apartment project pursuant to same, and by reason of plaintiff's negotiations with, and mortgage to the mortgagee hereinabove mentioned, and by reason of such mortgagee's contract of insurance with the Federal Housing Administration under and by virtue of the National Housing Act, and the defendant's endorsement of the note secured by said mortgage, the plaintiff, defendant, and said mortgagee, have entered into a trilateral contract, in compliance with which the plaintiff and its sponsors did materially alter their positions and incur great expense to the extent that they did expend vast sums of money in the erection and operation of said apartment project in reliance upon the promises, representations and agreements of the Federal Housing Administration acting by and through its duly authorized officers and agents; that such agreement is a contract with the United States government acting by and through the agency of the Federal Housing Administration.

3. That during all of the times herein referred to, the plaintiff and its sponsors have fully performed and are continuing to perform their part of such trilateral agreement; and are entitled to full performance on the part

of the United States Government; and that the Housing Act of 1954, under the purported authority of which the defendant seeks to impose the unwarranted and unreasonable restrictions upon the plaintiff's operation of its building, as hereinabove complained of, amounts to new legislation impairing or abrogating a contract with the United States Government, and is, therefore, unconstitutional and ought not to be enforced against the plaintiff.

4. That such Amendment (Public Law 560-83rd Congress, Chapter 649-2d Session; H.R. 7839, Sec. 513 (b) provides that:

> "(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954 the Commissioner has agreed in writing to the rental of all or a portion of the accomodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis.)"

that such provision is highly discriminatory, arbitrary and unjust in that it exempts from its operation projects (similar to plaintiff's project) which the Federal Housing Commissioner had prior to May 28, 1954, permitted to be rented for transient or hotel purposes, and projects located in areas which the Commissioner determines to be resort areas, and which said projects had been rented for such purposes prior to May 28, 1954; that this amounts to an excessive and unconstitutional grant of authority to an administrative officer of the executive

department of the government, and that such act is, therefore, unconstitutional and invalid.

5. That Section 513 (g) of such Amendment provides for criminal prosecution for such violation, that is the renting of any such units for terms of less than thirty days, occurring prior to August 2, 1954, the date of the passage of such Act, and is, therefore an *ex post facto* law, expressly prohibited by the Constitution of the United States and is invalid.

6. That Section 513 (i) provides that:

> "(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district Court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such act or practices, and upon a showing that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted."

and is special legislation of a highly discriminatory and inequitable nature purporting to grant special privileges and immunities and rights of action to a select group of citizens, such special privileges, immunities and rights of action not being enjoyed by the rest of the citizens of the United States, and is therefore, unconstitutional and invalid.

7. That the plaintiff has no adequate remedy at law other than this action.

WHEREFORE, the plaintiff prays judgment as follows:

17. 1. That the Court enter a Declaratory judgment construing and determining the relations and respective rights of plaintiff and defendant.

2. That the Court determine that the plaintiff corporation has the right to rent available vacant units in its building to tenants for terms of less than thirty days so long as it complies with the terms of the Housing Act in existence at the time of its incorporation, construction of its said building and insurance of the mortgage on the building by the defendant, and maintains and keeps rental units available for occupancy by tenants for terms of more than thirty days and maintains and operates its building principally for residental use.

3. That the Court issue an order directing the defendant to cease its interference with and hampering and hindering of the plaintiff's rightful operation of its apartment project; and that the defendant be permanently enjoined and restrained from such interference, hinderance and hampering of plaintiff's operation of said apartment project, and from the acts and threatened acts hereinabove complained of.

4. That the Court issue a preliminary injunction enjoining and restraining the defendant from the acts hereinabove complained of, pending the final deter-
18 mination of this action in this Court.

J. C. LONG,
J. C. Long,
Sergeant Jasper Building,
P. O. Box 242, Charleston, S. C.

HEMAN H. HIGGINS, JR.,
Heman H. Higgins,
104 Scriven Street,
P. O. Box 186, Georgetown, S. C.
Attorneys for Plaintiff

19 **Exhibit "A" to Amended Complaint**

FEDERAL HOUSING ADMINISTRATION
COLUMBIA, S. C.

January 4, 1955

The Darlington, Inc.—Attn: Mr. T. E. Steadman, Secretary
P. O. Box 288
Charleston, South Carolina

Re: Project No. 054-42030
The Darlington, Inc.
Charleston, South Carolina

Gentleman:

With further reference to the matter of transient occupancy at the Darlington we must again remind you that no furniture rentals have ever been approved for this project although all charges against its tenants are subject to regulation by the Commissioner.

If it can be shown that furniture is essential to obtain satisfactory occupancy, we may be able to approve a furniture rental schedule for these apartments. As a prerequisite to such approval, however, we must have your agreement not to accept any tenancy for a period of less than 30 days. This agreement should be in the form of a letter as per the attached specimen. The original and one copy of the letter should be signed by an officer of the mortgagor and forwarded to this office. The schedule to be attached to the letter should show the items of furniture to be provided with each time of apartment, the number of apartments so furnished, the cost of each item of furniture and the furniture rental to be charged for each group of items.

Parenthetically, we observe that no furniture rental may be approved which will amortize the actual cost of the furniture in less than 48 months. In establishing the furniture rental, consideration will be given only to such basic items as rugs, chairs, sofas, beds, bureaus, etc. necessary for comfortable occupancy, as distinguished from such items as linens, china, cutlery or similar items necessary for complete living accomodations.

Unless we receive the aforementioned agreement within 10 days from the date of this letter, we shall demand that you cease immediately the offering and renting of your

accomodations on a transient basis. Failure to comply with such demand, if same must be made, will leave us no alternative but to turn this matter over to our Legal Division for referral to the Department of Justice.

Your prompt reply will be appreciated.

Very truly yours,

W. E. Moore
Director

Attachment
cc: Mr. LeGrand W. Perce
Deputy Ass't Commissioner,
Multifamily Housing, FHA,
Washington, D. C.

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20 **Exhibit "B" to Amended Complaint**

The Darlington, Inc.
Charleston, S. C.

January 10, 1955

Reference—DO

Federal Housing Administration,
Office of the Director,
Columbia, South Carolina

Re: Project No. 054-42030
The Darlington, Inc.
Charleston, South Carolina

Attention: Mr. W. E. Moore,

Dear Mr. Moore:

This will acknowledge receipt of your letter of January 4th, with reference to the alleged matter of transient occupancy at the Darlington.

Let me assure you that it is the desire of this company to cooperate with your Administration in every reasonable manner, and certainly we have no desire to avoid any responsibility that may be imposed upon our company by the charter of the corporation, and we are sure your administration does not desire to impose any restrictions on our company on the operation of the building that is not called for by the provisions of the charter.

Our company owns no furniture whatsoever other than the furniture found in the lobby of the building.

As the records of this company will show, the building suffered terribly from vacancies, and we were unable to rent sufficient unfurnished apartments to care for the monthly payments called for by the mortgage. There was, however, continuous demand on the part of prospectime tenants for furnished apartments. This company did not have the funds to purchase furniture for furnishing the apartments on a cash basis, and, under the terms of the charter, we were advised by our attorneys that it was questionable whether our company could incur any indebtedness in connection with, or execute a mortgage over, furniture to be owned by our company.

We feel that the first and primary obligation of this company is to make the monthly payments called for by the mortgage, and thereby protect the Federal Housing Administration from any loss by virtue of its insurance contract. To keep the occupancy up to a point where
21 monthly payments could be made, it became absolutely necessary that tenants who desired furnished apartments be afforded the opportunity of renting the furniture.

This company, as set forth above, not being in position to buy furniture outright, and being prohibited by the charter from purchasing furniture on a time basis where the balance of the purchase price would be secured by mortgage, was successful in securing another corporation, to-wit: The Long Corporation, to buy the furniture and to place the furniture at the disposal of the tenants at an agreed rental for the use of the furniture.

As stated above, we are desirous of cooperating with your Administration in every reasonable way. If we are prohibited by law, or by the charter of this corporation, from renting any dwelling accommodation for periods of less than thirty days, of course, we will have to abide by such restrictions. We, therefore, would greatly appreciate if you would advise us what provisions of law or what provisions of our charter prohibits the renting of apartments for a period of less than thirty days.

Since our company owns no furniture, you can understand that we cannot sign the sample letter that was for-

warded to us with your letter of January 4th, for to sign the letter would be a mis-statement of the facts.

Assuring you of our cooperation at all times, we are,

Yours very truly,

THE DARLINGTON, INC.
By /s/ T. E. STEADMAN
Secretary

TES:hwn

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22 **Exhibit "C" to Amended Complaint**

FEDERAL HOUSING ADMINISTRATION
WASHINGTON 25, D. C.

Office of the
Assistant Commissioner

January 18, 1955

The Darlington Incorporated
P. O. Box 288
Charleston, South Carolina

Attention: Mr. T. E. Steadman, Secretary

Re: Project No. 054-42030
The Darlington, Inc.
Charleston, South Carolina

Gentlemen:

Your letter of January 10, 1955, addressed to our office in Columbia, South Carolina, relative to the matter of transient occupancy and furniture rentals, has been forwarded to us by Director W. E. Moore for reply.

It is our understanding that at least a portion of the accommodations provided in the captioned project are now being rented on a transient basis. You may not have heretofore been made aware of a section of the Housing Act of 1954 which prohibits the use of such government assisted projects for transient purposes. We are, therefore, quoting a portion of the new law.

> "Sec. 513 (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes

the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil of criminal action, if any, which the Attorney General may find to be involved in such violation."

You are hereby notified that if we do not receive written notice from you within ten (10) days from the date of this letter that transient operations in connection with this project have ceased, we will have no other alternative but to turn this matter over to our Legal Division for referral to the Department of Justice.

With respect to the matter of furniture rentals, we wish to advise that we will raise no objection to the furnishing of a number of the apartments and the charging of furniture rentals therefor, if in the opinion of our local office the furnishing of the apartments is necessary to obtain occupancy, provide the changes for the furniture is in the opinion of our local office reasonable and established on the basis as outlined in Director Moore's letter to you under date of January 4, 1955. Mr. Moore also advised that as a prerequisite to such approval it will be necessary for you to sign an agreement not to rent the apartments for periods of less than thirty days. In your letter you advise that The Darlington Inc. does not have title to the furniture. It is our understanding that the corporation that owns the furniture is controlled by the same interest that controls this corporation. As far as this Administration is concerned, the effect is the same as if it was owned by The Darlington, Inc. and therefore, the Agreement should be signed by the Long Corporation and this corporation.

We shall expect your cooperation in connection with the subject matters and will look forward to a prompt reply from you.

Very truly yours,

LeGrand W. Perce
LeGrand W. Perce
Deputy Assistant Commissioner

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34 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

The Darlington, Inc., *Plaintiff*,

v.

Federal Housing Administration, *Defendant*.

Order Dismissing Motions for Temporary Injunctive Relief and Retaining Jurisdiction—March 31, 1955

The above-entitled matter came on before me on March 31, 1955, in Charleston, South Carolina, upon motion of both plaintiff and defendant for preliminary injunctions seeking certain injunctive relief as set forth in their respective motions. A conference was had between the attorneys for the parties and it was agreed by both plaintiff and defendant that their respective motions would be withdrawn and abandoned and that the above-entitled matter, the issues of which will be hereinafter raised by the answer of the defendant, will be retained by me and will be heard upon either an agreed statement of facts, or otherwise, either in Norfolk, Virginia, or Charleston, South Carolina, at a time to be hereinafter designated.

The above agreement of the parties meets with the approval of this Court and, accordingly, it is

Ordered that the motions of both plaintiff and defendant for temporary injunctive relief be and the same are hereby dismissed.

IT IS FURTHER ORDERED that the undersigned United States District Judge shall retain jurisdiction of this entire matter until the same has been adjudicated by final order.

s/ WALTER E. HOFFMAN
Walter E. Hoffman
United States District Judge

ARTHUR G. HOWE
Arthur G. Howe
Assistant United States Attorney, Attorney for Defendant

March 31, 1955.

We consent to the foregoing Order.
s/ J. C. LONG
J. C. Long
Attorney for Plaintiff

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35 (File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

(Title omitted)

Answer and Cross-Complaint—Filed June 15, 1955

The defendant, Federal Housing Administration, answering the Amended Complaint of the plaintiff, alleges and says:

FIRST: That it denies each and every allegation in said Complaint save and except those hereinafter specifically admitted or modified.

SECOND: That it admits Paragraph 1 of the first cause of action of the Amended Complaint.

THIRD: That it denies so much of Paragraph 2 of the first cause of action which alleges that the Federal Housing Administration is subject to suit in this Court and alleges that Norman P. Mason, Commissioner, is the proper party defendant.

FOURTH: That it admits so much of the first cause of action of said Amended Complaint which alleges that the

plaintiff is a corporation operating under a charter supplied and furnished by the Federal Housing Administration; that it is the owner of an apartment project known as The Darlington and that the same exists as described in said Complaint; that plaintiff executed a note and mortgage dated December 7, 1949, and that the same contains the provisions and terms as described by plaintiff in said Complaint and that the same was insured by the defendant to the legal owner thereof; that plaintiff on or about the 1st day of February, 1952, did commence accepting application for furnished apartments in said project for terms of less than thirty (30) days and that defendant, through its agents, has attempted to require plaintiff to cease its practice of renting said apartments for terms of less than
36 thirty (30) days as is evidenced by Exhibits "A" and "C" attached to the said Complaint which said exhibits defendant admits the existence of; that some time during October or November of 1951, furniture was place in certain apartments of plaintiff's project but defendant alleges that the same was done without the written approval of the Commissioner; that defendant denies each and every other allegation in said first cause of action contained.

FIFTH: That it denies each and every allegation contained in the second cause of action and alleges that the same constitutes erroneous conclusions of law of the pleader.

FURTHER ANSWERING SAID COMPLAINT AND AS A CROSS-COMPLAINT THERETO, THE DEFENDANT ALLEGES AND SAYS:

FIRST: This Court has jurisdiction of the subject matter of this action under Section 513(j) of the National Housing Act of 1954(68 Stat. 950) and also under Title 28 U.S.C. 1345

SECOND: That Norman P. Mason is the Commissioner of the Federal Housing Administration and is the duly authorized person to commence suit or be sued on behalf of the Federal Housing Administration, and by this Answer and Cross-Complaint submits himself to the jurisdiction of this Court.

THIRD: Plaintiff is a South Carolina corporation with its principal office located in Charleston, South Carolina, and

was organized for the purpose of building a housing project to be financed by means of a Federal Housing Administration insured mortgage loan. A loan in the principal amount of One Million Three Hundred Fifty-seven Thousand Seven Hundred and no/100 ($1,357,700.00) Dollars and thereafter made for such purpose on December 7, 1949, and secured by a mortgage of even date therewith. This loan was initially endorsed for insurance on December 30, 1949, and finally endorsed for insurance on September 12, 1951, and said loan in at the present time insured by the Federal Housing Administration.

FOURTH: Plaintiff, upon accepting such Federal Housing Administration assistance and so long as this loan remains on this project, is subject to and bound by all of the provisions of the National Housing Act, as amended, the applicable Rules and Regulations of the Commissioner of the Federal Housing Administration promulgated thereunder and the provisions of its Charter of Incorpora-
37 tion.

FIFTH: That the purpose of this Cross-Complaint is to enforce the terms of the Charter of Incorporation of the plaintiff, the Rules and Regulations of the Commissioner of the Federal Housing Administration and the National Housing Act, as amended, specifically Section 513 of the 1954 Amendment which provides in part as follows:

> "Section 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.
>
> "(d) The Commisisoner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter

insured under this Act: Provided, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

"(e) As used in this section, (1) the term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term 'multifamily housing' shall mean (i) a property held by a mortgager upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, * * *.

"(f) Promptly after receipt of written notice that an portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

"(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district Court of the United State or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order,

with or without such injunction or restraining order, shall be granted without bond.

* * * * *

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

SIXTH: That, as is admitted by plaintiff in its letter of January 10, 1955, addressed to the Federal Housing Administration and attached to the Amended Complaint as Exhibit "B" and by Paragraph 18 of the said Complaint, plaintiff commenced accepting applications for furnished apartments for terms of less than thirty (30) days in violation of the terms of its Charter of Incorporation, the Rules and Regulations of the Commissioner of the Federal Housing Administration and the National Housing Act, as amended, and that by letters dated January 4, 1955, and January 18, 1955, plaintiff was ordered to cease said violation and copies of said letters are attached to plaintiff's Amended Complaint and are designated therein as Exhibits "A" and "C" respectively.

SEVENTH: That, commencing during October or November of 1951, plaintiff without procuring the written approval of the Commissioner and in violation of its Charter and the Rules and Regulations of the Federal Housing Administration furnished, or caused to be furnished, a number of units of its said project.

EIGHTH: That, in spite of plaintiff being ordered to cease its practice of renting apartments in its project for terms of less than thirty (30) days and from furnishing units therein without the approval of the Commissioner, plaintiff has failed and refused to cease said practices which violate the terms of its Charter of Incorporation, the Rules and Regulations of the Commissioner of the Federal Housing Administration and the National Housing Act, as amended.

NINTH: Defendant has no adequate remedy at law because, if the violations here involved are not enjoined, they will continue and the purpose and intent of the Federal Government's vital housing program as embodied in the National Housing Act will be frustrated, all to the immediate and irreparable injury of the Government. Money damages cannot provide the relief here sought or prevent these violations from recurring.

TENTH: The Attorney General is required by Section 513(h) of the National Housing Act of 1954 upon a proper showing to petition this Court for an Order enjoining acts and practices in violation of Section 513.

WHEREFORE, having fully answered the Amended Complaint of the plaintiff, defendant prays as follows:

1. That the said Amended Complaint of the plaintiff be dismissed and that it be taxed the costs of this action.

2. That this Court enter an Order for a permanent injunction perpetually restraining plaintiff from renting any of the units of its project for any term less than thirty (30) days; from charging rent for any unit in excess of the monthly rental schedule approved by the Commissioner; from furnishing any of the units of the project or supplying any services without the prior approval of the Commissioner in writing; and from advertising said project as a hotel, motel or any other similar designation specifically or impliedly soliciting transient or guest accommodations.

3. That this Court enter an Order temporarily enjoining plaintiff from any of the aforesaid acts pending a final determination of this action.

4. For such other and further relief as to this Court may seem just, proper and equitable.

N. WELCH MORRISETTE, JR.
United States Attorney

By /s/ ARTHUR G. HOWE
Arthur G. Howe
Assistant United States Attorney

Charleston, S. C.
June 7, 1955.

(File endorsement omitted)

40 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

(Title omitted)

Reply to Cross-Complaint—Filed June 30, 1955

The plaintiff, by way of reply to the Cross-Complaint or Counterclaim of the defendant, would respectfully show unto the Court:

1. That the plaintiff denies the allegations contained in Paragraph First of said Cross-Complaint or Counterclaim, and alleges that the National Housing Act of 1954 (68 Stat. 590), including Section 513 (j) thereof, has no application to the case at bar. The plaintiff further alleges that the Court's jurisdiction of this action rests upon the authority of Title 12 U.S.C.A. Section 1702 only.

2. The plaintiff admits so much of Paragraph Second of said Cross-Complaint or Counterclaim as alleges that Norman P. Mason is the Commissioner of the Federal Housing Administration, and to commence suit or be sued on behalf of the Federal Housing Administration; but plaintiff further alleges that Title 12 U.S.C.A. Section 1702 permits action or suit against the Federal Housing Administration, since the Commissioner acts for and in behalf of the Administration; however, plaintiff submits that this is now a moot question since said Norman P. Mason has by his Answer and Cross-Complaint submitted himself to the jurisdiction of this Court.

41 3. Plaintiff admits the allegations contained in Paragraph Third of said Cross-Complaint or Counterclaim.

4. Answering Paragraph Fourth of said Cross-Complaint or Counterclaim, plaintiff denies so much thereof as alleges or implies that plaintiff is subject to and bound by any provisions of the National Housing Act, or any Rules or Regulations of the Federal Housing Administration enacted or promulgated subsequent to the time of endorsement and insurance by the Federal Housing Administra-

tion or Commissioner of the note and mortgage of the plaintiff referred to in Paragraph 8 of the Amended Complaint herein.

5. The plaintiff specifically denies the allegations contained in Paragraph fifth of said Cross-Complaint or Counterclaim, and alleges that the purpose of the defendant's counterclaim is to cause the plaintiff to cease renting a small portion of its available units with furniture upon demand of prospective tenants for any term of less than Thirty (30) days, and to force plaintiff to keep such units vacant in the absence of any demand for them for terms of more than thirty (30) days, which will inevitably result in the insolvency of the plaintiff corporation, the foreclosure of the mortgage above referred to, and financial loss to the Federal Housing Administration under contract of mortgage insurance entered into by it in connection with such mortgage.

The plaintiff further alleges that neither at the time of plaintiffs's incorporation, nor at the time of insurance of the loan and mortgage on its project by the Federal Housing Administration, was there any provision in the National Housing Act, or in any other statute, Rules and Regulations of the Federal Housing Administration, plaintiff's Charter of Incorporation, or in any agreement to which plaintiff was a party, which prohibited plaintiff from renting apartments in its project for terms
42 less than thirty (30) days; that the plaintiff's right to rent certain of its apartments for terms of less than thirty (30) days, is a vested property right which plaintiff acquired and was enjoying prior to the enactment of Section 513 of the 1954 Amendment to the National Housing Act, and that such right is protected by the Constitution of the United States, and that any attempt to apply the provisions of such section to the operation of plaintiff's apartment project so as to prohibit plaintiff from renting units therein for terms of less than thirty (30) days, would be to deprive plaintiff of its vested property rights and would constitute a taking of private property without just compensation in violation of the Constitution of the United States.

6. Answering Paragraph Sixth of said Cross-Complaint or Counterclaim, plaintiff admits that it commenced accept-

ing applications for furnished apartments for terms of less than thirty (30) days, but specifically denies that such acts were in violation of the terms of its Charter of Incorporation, the Rules and Regulations of the Commissioner of the Federal Housing Administration, or the National Housing Act, under which plaintiff was incorporated and was operating.

7. Answering Paragraph Seventh of said Cross-Complaint or Counterclaim, admits that, commencing during October or November of 1951, plaintiff allowed furniture to be made available in certain of its apartments to tenants who requested it, but specifically denies that such acts constituted any violation of plaintiff's Charter or the Rules and Regulations of the Federal Housing Administration.

8. Answering Paragraph Eighth of said Cross-
43 Complaint or Counterclaim, plaintiff admits that it failed and refused to cease renting a small portion of the apartments in its project for terms of less than thirty (30) days, and from causing furniture to be available in certain units, but denies that such acts constitute any violation of its Charter of Incorporation, the Rules and Regulations of the Commissioner of the Federal Housing Administration or any terms or provisions of the National Housing Act applicable to plaintiff or the operation of plaintiff's apartment project. Plaintiff alleges that the Federal Housing Administration had no authority or power to order plaintiff to cease such acts.

Plaintiff further alleges that at no time did it rent more than a small percentage of its apartments for terms of less than thirty (30) days, and those only when specifically requested by tenants and when there was no demand for such apartments for terms of thirty (30) days or more; that such was not a publicized policy, and that plaintiff never advertised its apartments as being available for terms of less than thirty (30) days, and never at any time held itself out as offering transient accommodations.

9. Plaintiff denies the allegations contained in Paragraph Ninth of said Cross-Complaint or Counterclaim. Plaintiff specifically denies that the acts complained of in such Cross-Complaint or Counterclaim are violations of

any law, rule or regulation applicable to the operation of plaintiff's apartment project. Plaintiff further denies that a continuance of such acts complained of by the Federal Housing Administration, would frustrate or in anywise impair the purpose and intent of the Government's Housing Program as embodied in the National Housing Act, or that such acts will result in any damage or injury to the Government. On the contrary, the plaintiff alleges that it was the purpose and intent of the Natio . Housing Act, under which plaintiff was incorporated and has operated its project, to provide housing for returning veterans of the Armed Forces, and it is nowhere stated that such
44 purpose was to provide housing for terms of more than or less than thirty (30) days.

Plaintiff alleges that it has maintained and operated its project principally and primarily to provide residential housing in keeping with the spirit and purpose of the National Housing Act, and that it has rented a small percentage of its apartments as furnished apartments for terms of less than thirty (30) days only because it was impossible to rent them for longer periods furnished or unfurnished. That a cessation of such acts would result in plaintiff's operating its project at a substantial loss, which would result in plaintiff's insolvency and inability to meet its obligations under the note and mortgage referred to in Paragraph 8 of the Complaint herein, foreclosure of such mortgage and financial loss to the United States Government under the endorsement of such note and contract of mortgage insurance entered into by the Federal Housing Administration in connection with such mortgage.

10. Answering Paragraph Tenth of said Cross-Complaint or Counterclaim, Plaintiff denies that Section 513 (h) of the National Housing Act of 1954, is applicable to the plaintiff's operation of its apartment building, and alleges that the Attorney General has no authority to petition this Court for any order enjoining the Plaintiff from the practice of renting certain of its units as furnished apartments for terms of less than thirty (30) days.

11. Plaintiff denies each and every allegation contained in such Cross-Complaint or Counterclaim not herein specifically admitted.

WHEREFORE, Plaintiff prays:

1. That said Cross-Complaint or Counterclaim of defendant be dismissed.

2. That the plaintiff be given judgment as prayed for in the Amended Complaint.

45 3. For such other and further relief as the Court may deem just, proper and equitable.

/s/ J. C. LONG
J. C. Long,
90 Broad Street,
P.O. Box 242,
Charleston, S. C.

/s/ HEMAN H. HIGGINS, JR.
Heman H. Higgins, Jr.,
104 Scriven Street,
P. O. Box 186,
Georgetown, S. C.
Attorneys for Plaintiff.

Charleston, S. C.
June 24, 1955.

(File endorsement omitted)

51-52 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

THE DARLINGTON, INC., *Plaintiff,*

v.

FEDERAL HOUSING ADMINISTRATION, *Defendant.*

Memorandum Re Convening of Three-Judge Court—August 25, 1955

Plaintiff erected a large apartment project consisting of 156 rental units in the City of Charleston, South Carolina, during the year 1950-51, at a cost in excess of $1,500,000, which was financed by defendant as a "608 project" and

a note executed on December 30, 1949, in the sum of $1,357,700. According to the pleadings, disregarding what may have been the intent of Congress, there were no limitations placed upon plaintiff-mortgagor with respect to transient leasing of apartments. By reason of inability to rent all units, plaintiff, on or about February 1, 1952, began to accept applications for apartments for terms of less than 30 days, and caused certain vacant apartments to be furnished for occupancy.

No apparent complaint was registered by defendant as to this procedure until January 4, 1955, at which time defendant demanded that plaintiff cease and desist from the practice of renting units for less than 30 days. Plaintiff insists that if required to comply with this request, it will mean bankruptcy and a loss of equity thus far invested.

Congress, during the year 1954, amended the National Housing Act, 12 U.S.C.A., § 1731(b), by inserting § 513 of the Act (attached as an exhibit to the brief of plaintiff). By this amendment Congress has declared, in 1954, an intention which, according to the amendment, has been in effect since the passage of the National Housing Act, and has further expressly restricted the right of mortgagors, such as the plaintiff herein, from renting for "transient or hotel purposes", same being defined as any rental for a period of less than 30 days.

53 Plaintiff's action, in the form of a declaratory judgment seeking an injunction, endeavors to restrain the enforcement, operation or execution of § 513 for repugnance to the Constitution of the United States. Should plaintiff ultimately prevail, it is difficult to believe that any Court could avoid a full discussion of the constitutionality of this section as the very wording of the Act expresses a retroactive intent.

Application for injunction having been made to the undersigned District Judge, sitting by designation, it is the opinion of this Court that a three-judge district court should be convened pursuant to 28 U.S.C.A., § 2284, for the purpose of hearing defendant's motion for summary judgment.

(Sdg) WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
August 25, 1955

(File endorsement omitted)

54 IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

(Title omitted)

Order Convening Three-Judge Court—August 29, 1955

It appearing to the undersigned Chief Judge of the Fourth Judicial Circuit of the United States that a civil action as above entitled has been instituted in the United States District Court for the Eastern District of South Carolina, asking that a statute of the United States be declared unconstitutional and void and that defendant be enjoined from enforcing same or taking any action thereunder against plaintiff; and that application for injunction has been made and that the undersigned has been notified, pursuant to section 2284(1) of Title 28 of the United States Code, of the pendency of said application to the end that a court of three judges may be constituted as required by 28 USC 2282:

Now, therefore, I do hereby designate Honorable George Bell Timmerman, United States District Judge for the Eastern and Western Districts of South Carolina, and the undersigned, Chief Judge of the Fourth Judicial Circuit, to serve with Honorable Walter E. Hoffman, United States District Judge for Eastern District of Virginia, sitting by designation in the Eastern District of South Carolina, in the hearing and determination of the above entitled action as provided by law, the three to constitute a District Court of three judges as provided by section 2284 of Title 28 of the United States Code.

55 And I do set the said cause for hearing at Charleston, South Carolina, on Monday September 26, 1955, at 10 o'Clock A. M. and direct that at least five days' notice of the hearing thereof shall be given to the Attorney General of the United States, the United States Attorney for the Eastern District of South Carolina and to the parties to the cause.

It is further ordered that the parties file typewritten briefs in this cause not later than September 19, sending copies thereof to each of the Judges and to opposing counsel. In said briefs the parties, in addition to dealing

with the questions arising in the case, shall deal with the question to whether the case is one for a court of three judges, particularly whether a substantial question as to right to injunctive relief is presented where the threatened action is the institution of criminal proceedings or institution of proceedings for injunctive relief, which is asked in the answer and cross complaint filed herein.

Done at Charlotte, North Carolina, this the 29th day of August, 1955.

/s/ JOHN J. PARKER
Chief Judge, Fourth Circuit

(File endorsement omitted)

56 IN THE UNITED STATES DISTRICT COURT

Affidavit of Norman P. Mason—Filed September 22, 1955

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss:

NORMAN P. MASON, being first duly sworn, deposes and says:

1. That he is the Commissioner of the Federal Housing Administration.

2. That his is informed and believes and therefore alleges that since the inception of the National Housing Act the language "principally designed for residential use", as it appears in the Act, has been interpreted by the Federal Housing Administration:

(a) To allow FHA to insure residences in which such buyers as doctors, dentists, chiropractors, etc., might establish an office.

(b) To allow FHA to insure multifamily housing projects in which space is set aside for commercial facilities, catering to the resident families.

3. That The Darlington, Inc. submitted a rental schedule on or about September 10, 1951 which was approved by the Federal Housing Administration, and that no deviation from this rental schedule has been approved by the Federal Houings Administration.

4. That he is informed and believes and therefore alleges that all multifamily housing projects built under Section 608 of the National Housing Act made provision for facilities for family living, such as gas, refrigeration and electricity and that none of said projects was designed as a hotel.

NORMAN P. MASON
Norman P. Mason, *Commissioner.*

Subscribed and sworn to before me this
21 day of September, 1955.

RUTH M. BOLLIE
Notary Public

My commission expires July 31, 1958.

(File endorsement omitted)

57 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 4741

THE DARLINGTON, INC., *Plaintiff,*

versus

FEDERAL HOUSING ADMINISTRATION, *Defendant.*

Per Curiam Opinion on Application for Injunction—Filed September 23, 1955

Before Parker, Circuit Judge, and Timmerman and Hoffman, District Judges.

58 Per Curiam:

Plaintiff is the owner of an apartment house at Charleston, S. C, covered by a mortgage which has been insured by the Federal Housing Administration pursuant to the provisions of the Federal Housing Act of 1934. The apartment house was erected and the mortgage thereon executed by plaintiff and insured by the Federal Housing Administration prior to the passage of the Federal Housing Act of 1954, 68 Stat. 590, and nothing in any of the contracts relating to the construction of the apartment house, the

execution of the mortgage thereon or the insuring of the same by the Federal Housing Administration limits the right of plaintiff with respect to the rental of apartments for transient purposes or for less than thirty days. Plaintiff has been renting apartments to transients and for less than thirty day periods and contends that it will sustain irreparable loss unless permitted to continue renting in this way. Since the passage of the Federal Housing Act of 1954 the Federal Housing Administration has attempted to force plaintiff to desist from this rental practice, contending that same is forbidden by the provisions of that act. Plaintiff contends that the act should not be interpreted to apply to mortgages and guaranties thereof executed prior to its passage and that, if so interpreted, it is violative of provisions of the Constitution of the United States. In its complaint plaintiff asks a declaratory judgment establishing its rights in the premises and further asks that the commissioner be enjoined and restrained from interfering with its operation of the apartment project.

The defendant, Federal Housing Administration, and the Commissioner of the Federal Housing Admin-
59 istration, have filed an answer contending that plaintiff is bound by the provisions of the National Housing Act as amended and all applicable rules and regulations of the Commissioner promulgated thereunder, and, under the provisions of the Act of 1954, they ask that plaintiff be enjoined and restrained from renting apartments for less than thirty days or from charging rentals therefor in excess of the schedules approved by the Commissioner.

The District Judge before whom the case was pending requested that a three-judge court be convened because injunctive relief was asked to restrain the enforcement of the Act of 1954 on the ground that it was unconstitutional; and this court of three judges has been convened pursuant to his request. An examination of the pleadings in the light of the applicable law, however, has convinced the members of the court that the case is not one for which a three-judge court is appropriate. While a substantial question as to the constitutionality of the statute in question is raised, if it be given retroactive application, the real question involved is one of statutory

interpretation rather than the validity of the statute and, what is conclusive on the matter of the necessity for a three-judge court, the pleadings do not disclose a case where the granting of an injunction would be proper. There is no allegation that defendants are about to institute criminal proceedings against plaintiff; and an examination of the applicable statutes fails to disclose any criminal proceedings which would be applicable to the facts as pleaded. Action under the statute against plain-
60 tiff by the Administrator would be by way of injunctive relief; and it is well settled that an injunction will not issue to restrain the issuance of an injunction. Carolina-Virginia Racing Association v. Cahoon 4 Cir. 214 F. 2d 830, 833-834; Ritholz v. North Carolina State Board of Examiner's in Optometry 18 F. Supp. 407. Even if criminal prosecutions could be instituted, it is likewise well settled that injunction will not issue to enjoin the enforcement of criminal statutes in the absence of a clear showing that this is necessary for the protection of property rights. Carolina-Virginia Racing Association v. Cahoon, supra; Standard Oil Co. v. Charlottesville 4 Cir. 42 F. 2d 88, 93-94; Stefanelli v. Minard 342 U. S. 117, 120; Watson v. Buck 313 U. S. 387, 401.

It should be noted, further, that the defendants have asked an injunction in their answer; and the court's ruling on this will determine finally the rights of the parties without consideration of plaintiff's prayer for injunction. A three-judge court is, of course, not appropriate for the determination of the Administration's right to an injunction under the act. The case, therefore, is not one in which injunctive relief to plaintiff would be appropriate in any aspect. Since there is no ground for issuing an injunction on the prayer of plaintiff, on the present state of the pleadings, there is no reason for a three-judge court; for only where injunction could be issued restraining the enforcement of a statute is a three-judge court required. See 18 USC 2282. We think it clear that this section is to be strictly construed for the same reasons as section 2281. See Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 375; Phillips v. United States, 312 U. S. 246; Oklahoma Gas & Electric Co. v. Okla-
61 homa Packing Co., 292 U. S. 386, 391; Ex Parte Collins, 277 U. S. 565, 569.

The three-judge court will, accordingly, be dissolved and the case will be heard by Judge Hoffman sitting by designation in the Eastern District of South Carolina.

I concur, John J. Parker, U. S. Circuit Judge.

I concur, Walter E. Hoffman, U. S. District Judge.

(File endorsement omitted)

62 IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

THE DARLINGTON, INC., *Plaintiff*,

versus

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Order Dissolving Three Judge Court—Filed September 23, 1955

It appearing to the court in the above entitled case, in which the court of three judges has been constituted, that a court of three judges is not required by statute and is not appropriate for the hearing of the case, for reasons set forth in the written opinion filed herewith:

It is ordered that the three-judge court be and same is hereby dissolved, and that the judges other than Judge Hoffman retire from further consideration of the case and that same be heard by Judge Hoffman sitting by designation in the Eastern District of South Carolina.

JOHN J. PARKER
United States Circuit Judge.

GEORGE B. TIMMERMAN
United States District Judge for the Eastern and Western Districts of South Carolina

WALTER E. HOFFMAN
United States District Judge for the Eastern District of Virginia sitting by designation in the Eastern District of South Carolina.

69 IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C/A 4741

THE DARLINGTON, INC., *Plaintiff*,

vs.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Transcript of Proceedings and Testimony of September 26, 1955

A hearing was held in this matter on the 26th day of September, 1955, in the United States Courtroom at Charleston, South Carolina, with

Honorable Walter E. Hoffman, United States District Judge, *Presiding*

APPEARANCES:

J. C. Long, Esq., and H. H. Higgins, Jr., Esq., *For Plaintiff*

Arthur G. Howe, Esq., Asst. U. S. Attorney, and Carl Eardley, Esq., Special Attorney, Department of Justice, *For Defendant*

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97 **Offers in Evidence**

Mr. Long: Next is a plan of the Darlington Apartments made by William G. Lyles, Bissett, Carlyle and Wolfe, Architects, consisting of a drainange plat, which is a plot plat, a first floor plan, a second floor plan, a plan of the 4th through the 12th floors, inclusive, a plan showing the pent houses, an exterior front elevation, an exterior back elevation, and side elevations.

The Court: Let the plat referred to be admitted as
98 Plaintiff's Exhibit No. 5.

ARCHITECTS' PLAN OF THE DARLINGTON APARTMENTS marked in evidence as *Plaintiff's Exhibit No. 5.*

• • • • • • • • • • • •

101 The Court: • • • I think the best thing for me to do would be to defer ruling on Plaintiff's Exhibit

No. 8 until I have had an opportunity to review it myself, gentlemen, and that will save some time.

Mr. Long: Your Honor, we offer—

The Court: Just mark it admitted to the further ruling of the Court.

LETTER dated January 7, 1947, from Franklin D. Richards, Assistant Commissioner, FHA, to Directors of all Field Offices, marked as *Plaintiff's Exhibit No. 8 for identification,* subject to the further ruling of the Court.

102

Mr. Long: Your Honor, we offer letter of January 2, 1947, from Raymond M. Foley, Commissioner of the FHA, to Directors of all Field Offices, consisting of some five pages. I presume the Court will make a similar ruling on this.

Mr. Eardley: Your Honor, I don't know what it is.

Mr. Long: All I have here is what was submitted to you.

Mr. Eardley: Then I make the same objection.

The Court: And the Court makes the same ruling, that Plaintiff's Exhibit No. 9 will be admitted subject to the further ruling of the Court as to its pertinency and relevancy.

LETTER dated January 2, 1947, from Raymond M. Foley, Commissioner of the FHA, to Directors of all Field Offices, marked as *Plaintiff's Exhibit No. 9 for identification,* subject to the further ruling of the Court.

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Mr. Long: All right. At this time, your Honor, there is a stipulation between the parties that the following documents that were executed in connection with the insurance of this project shall be admitted in evidence.

109

The Court: Let the stipulation with the attached documents be marked as Plaintiff's Exhibit No. 19, merely as a means of identifying it. I recognize that it is by stipulation, and strictly speaking not either a plaintiff's exhibit or a defendant's exhibit. Those documents, if you would like to read them for the purpose of the record, Mr. Long, I think it might be well. Plaintiff's Exhibit No. 19.

Mr. Long: First, your Honor, is the Application of the mortgagee and the mortgagor for Mortgage Insurance under Section 608 of the National Housing Act. This con-

sists of some four pages, and it is signed L. D. Long. Next, is FHA Form 2013e, a Supplement to the Mortgagee's application for Insurance, the substance of which is that the sponsor of the corporation agrees that preference or priority to occupants—to occupy the family units. That the family units contained in the building shall be given to veterans of World War II and to their immediate families. And second, the letter stipulates that in selecting tenants for the building, there will be no discrimination against families with children, and provides that if he does discriminate against families with children, he is subject to a $500 fine.

110 The next is the Mortgage Note, signed by L. D. Long, in the amount of $1,357,700.00, calling for the payment set forth, and on the back of the note is the endorsement of insurance by the Federal Housing Commissioner stating that the note is insured under Section 608 of the National Housing Act and regulations thereunder of the Federal Housing Commissioner, in effect December 30, 1949.

The next is the Mortgage.

The next is the Commitment for Insurance, addressed by the Federal Housing Administration to both the then mortgagee and to the sponsor of the Darlington Apartments, L. D. Long.

Next is the Building Loan Agreement, an agreement whereby the mortgagee and the mortagor agree to subject themselves to FHA regulations in the advancement of funds, etc.

Next is the Trade Payment Breakdown of the Federal Housing Administration, which I believe is a part of the Building and Loan Agreement. That is the Trade Payment Breakdown.

The next is a copy of the Charter of The Darlington Inc., granted by the Secretary of the State of South Carolina, the Charter being dated 7th day of December, 1949.

Next is a copy of the By-Laws of the Darlington Apartments.

111 And next is a photostatic copy of the sheet captioned Information on Section 608 Rental Projects. This in fact is the stipulation as to what rent should be charged—as to what should be the first rent charged for the building.

The Court: The documents that counsel for the plaintiff has referred to will be marked as Plaintiff's Exhibit No. 19.

STIPULATION WITH ATTACHED DOCUMENTS marked in evidence as *Plaintiff's Exhibit No. 19.*

. . . . . .

114 Mr. Long: Now, your Honor, I believe that Mr. Eardley has a letter from Judge Bailey, a copy of a letter from Judge Bailey, addressed to the corporation. Next is a letter from H. E. Bailey, State Director, to T. E. Steadman, dated September 13, 1951, and to which was attached FHA Form 2458-W, dealing with the rental schedule and information on rental project.

Mr. Eardley: No objection.

The Court: Let it be admitted as Plaintiff's Exhibit No. 24 and the attached rental schedule as Exhibit 24 (a).

. . . . . .

1[illegible] Mr. Long: Next, your Honor, we offer in evidence the report on the hearings held by the Committee on Banking and Currency of the United States Senate in connection with the housing act of 1954. First, we offer Part 1.

Mr. Eardley: In order that I may be somewhat alerted, will Mr. Long specify the pages on which he intends

118 to rely?

Mr. Long: We are going to give him a typewritten excerpt of the parts that we rely upon. We are going to furnish that to the Court and to Mr. Eardley.

Mr. Eardley: There is no way that I can at this time offer an objection because I haven't the faintest idea what the purpose is. Your Honor can take judicial notice of what this document is and what it contains, but what he wants to establish is another question.

The Court: I think of course the report on the hearings is unquestionably admissible for the purpose of this case. I guess you want it, as well as Mr. Long, perhaps; I don't know. But I can't tell—I would appreciate it if Mr. Long in due time would leave the exhibits here in Charleston, and then if Mr. Long will in due time present to the Court and to Mr. Eardley and Mr. Howe specific page references—

Mr. Long: Here is a typewritten excerpt of the parts that we are relying on. Give Mr. Eardley a copy of that, please, Mr. Higgins.

The Court: I think, however, we will admit the book because I think it is well to have it. The excerpts as given here by Mr. Long may have some forerunner or something stated after it that we should take cognizance of. Therefore, let that particular volume be admitted as Plain-
119 tiff's Exhibit No. 27.

PART I, HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY, UNITED STATES SENATE, ON HOUSING ACT OF 1954, marked in evidence as *Plaintiff's Exhibit No. 27.*

Mr. Long: And we offer in evidence Part 3 of the same hearings by the same committee on the housing act of 1954.

The Court: Plaintiff's Exhibit No. 28.

Mr. Eardley: Are they in here?

Mr. Long: They are included in those excerpts. That is right, isn't it, Mr. Higgins?

Mr. Higgins: That is correct.

PART 3, HEARINGS BEFORE THE COMMITTEE ON BANKING AND CURRENCY, UNITED STATES SENATE, ON HOUSING ACT OF 1954, marked in evidence as *Plaintiff's Exhibit No. 28.*

. . . . . .

120 Next we offer the same volume of the Congressional Record, Section 143, for July 28, 1954.

The Court: Plaintiff's Exhibit No. 30.

CONGRESSIONAL RECORD, VOL. 100, NO. 143, JULY 28, 1954, marked in evidence as *Plaintiff's Exhibit No. 30.*

. . . . . .

121 Mr. Long: Next we offer in evidence FAH Form No. 246, revised September 1947, captioned Planning Rental Housing Projects.

Mr. Eardley: May I inquire as to the purpose of this Exhibit?

Mr. Long: The purpose of this exhibit, your Honor, primarily will be shown by reference to living unit sizes and

characteristics, where it states, except in efficiency units, each family living unit should have not less than three habitable rooms, again excepting efficiency units, each separate living unit should provide as follows.

Mr. Eardley: No objection.

Mr. Long: It shows that the FHA recognized that efficiency apartments were not—

The Court: Let it be admitted as Plaintiff's Exhibit No. 31.

BOOKLET, PLANNING RENTAL HOUSING PROJECTS, REVISED September 1947, marked in evidence as *Plaintiff's Exhibit No. 31.*

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122 BOOKLET, FEDERAL HOUSING ADMINISTRATION HANDBOOK FOR EMPLOYEES marked in evidence as *Plaintiff's Exhibit No. 32.*

123 Mr. Long: Next, your Honor, we offer in evidence an affidavit by John W. Finley dated the 10th day of August, 1955, of which I think you have a copy. You received that in Norfolk. The affidavit in substance states that there have always been apartments available for occupancy for 30 days or more and no tenants have ever had to wait as much as 24 hours.

Mr. Eardley: I would object to it on the ground that it is immaterial even if the facts are correct. If the exhibit is admitted I might, after further thought, ask leave to cross examine Mr. Finley.

The Court: Is he present here in court?

Mr. Long: Yes, sir. He is right back there.

The Court: Well I will grant you of course leave to cross examine Mr. Finley. I don't know that it would be immaterial, Mr. Eardley. It is a part of the plaintiff's burden in proving its cause, if any it has, by way of declaratory judgment, to show that the only time that they rented rooms or apartments for periods of less than 30 days was when they had such apartments available at all times. I don't think there is any contention in this case that the Darlington Corporation at any time failed to give preference to veterans or at any time held any-

124 one up by reason of not having an apartment available.

Mr. Eardley: That is correct. And the fact that it complied with one of the regulations doesn't have any bearing on whether it complied with another regulation.

The Court: That is right. The only difference is that you gentlemen haven't stipulated to that effect and in the absence of the stipulation, why I suppose it is part of the plaintiff's case to prove that. That is the only reason I would admit the affidavit. Let it be admitted as Plaintiff's Exhibit No. 33, subject to the right to cross examine Mr. Finley.

AFFIDAVIT OF JOHN W. FINLEY, dated August 10, 1955, marked in evidence as *Plaintiff's Exhibit No 33*, subject to the right of Mr. Eardley to cross examine Mr. Finley.

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125 Mr. Long: Next is an affidavit of Mr. Steadman to the effect that the books and records of the company will show that all furniture in the building is owned by the Long Corporation and not the Darlington Corporation, and that the records will show that all rent from all apartments in the building that are furnished for 30 days or longer, that the rent for the furniture is turned over to the Long Corporation each month. And the next part of the affidavit sets forth that from the apartments that are rented for less than 30 days, there is credited to the Darlington account 1/30th of the established rent for each day of its occupancy and that the remainder of the charge is turned over to the Long Corporation to take care of furniture rent, the cleaning of the apartment, and the linen et cetera.

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126 AFFIDAVIT OF T. E. STEADMAN, dated September 23, 1955, marked in evidence as *Plaintiff's Exhibit No. 35*, subject to the right of Mr. Eardley to cross examine Mr. Steadman.

Mr. Long: Next is the affidavit of Mr. Steadman
127 which shows the operating loss of the Darlington Apartments. This affidavit was submitted to Mr. Eardley in Norfolk.

Mr. Eardley: We object to the affidavit on the ground that even if the facts alleged in here are true, it wouldn't

be material to the issues in this case, which is simply to determine whether or not under the law they are entitled to rent to transients. The law doesn't say that if you make a loss you are entitled to rent to transients. And I don't believe that Mr. Long in his brief tries to make any such point.

The Court: Objection overruled. I will admit it.

Mr. Eardley: Then I would like to reserve again the right to cross examine Mr. Steadman in the event I find it necessary.

The Court: Let it be admitted as Plaintiff's Exhibit No. 36, subject to the right of counsel for defendant to cross examine Mr. Steadman.

AFFIDAVIT OF T. E. STEADMAN, dated August 10, 1955, marked in evidence as *Plaintiff's Exhibit No. 36*, subject to the right of Mr. Eardley to cross examine Mr. Steadman.

* * * * * * * * * *

128 Mr. Long: Next, your Honor, is a copy of the local newspaper, the News & Courier, dated Sunday morning, July 15, 1951, which carried an ad reading as follows: 30-day preference allowed to veterans of WORLD WAR II, their families and widows, Darlington Apartments, Dial 3161.

The Court: Well I don't see any need of admitting it, Mr. Long. It will just clutter up the record. There is no question, as I understand, that preference has been given at all times to veterans, and that there is no question of discrimination against families with children.

Mr. Eardley: Those are not the issues in this case.

The Court: Yes. So we will just leave that out. There is no need to clutter up the record with that.

* * * * * * * * * *

131 TESTIMONY FOR PLAINTIFF

RUDOLPH BARNES, SWORN

Direct Examination

By Mr. Long:

Q. Mr. Barnes, you are an attorney? A. Yes, sir.

Q. Practing law in Columbia, South Carolina? A. Yes, sir.

Q. And have been for how many years? A. Fifteen years.

Q. Fifteen years. Did you handle most of the so-called 608 insured mortgage loans in the State of South Carolina? A. Our office handled a sizeable number of them. I would guess somewhere between 35 and 50.

Q. 35 and 50. Were you the attorney for the Darlington, Inc., in connection with the application that was
132 made to the Federal Housing Administration for a 608 insured mortgage? A. I was.

Q. Would you please state whether or not, in connection with the application that you handled for the Darlington Apartments, Inc., for a 608 insured mortgage, or in connection with the applications that you handled for the 35 to 50 other sponsoring corporations of 608 insured loans, if at any time it was indicated or suggested to you in any way whatsoever that there was any prohibition or any intent of the Federal Housing Administration that apartments in the buildings could not be rented for 30 days or less? A. There was no prohibition as far as I knew and there is certainly nothing in the charter that would prohibit it. That is generally where we had the prohibitions, in the charter itself.

Q. Mr. Barnes, have you looked at a copy of the by-laws here (indicating)? A. Yes, sir.

Q. Is this the copy that you submitted to the FHA in connection with the Darlington? A. Yes, sir. That is a carbon copy of the original, a signed copy.

Mr. Long: Now, your Honor, we are where we need our witnesses here, but I think maybe Mr. Eardley can give it to me.

133 Mr. Eardley, have you got a copy of the stipulation that the Federal Housing Administration sent out in 1952 that required after that date that there be inserted in a 608 mortgage that no apartments could be rented for 30 days or less?

Mr. Eardley: You mean, a field directive?

Mr. Long: It was sent out by the FHA in 1952.

Mr. Eardley: Is this it (handing)?

Mr. Long: Let's see. No.

Mr. Eardley: That is the only one I have. I am sorry.

Mr. Long: The witness is with you.

Cross Examination

By Mr. Eardley:

Q. Mr. Barnes, I understand that you were not representing the FHA, you were representing private clients? A. The owner-corporations, yes, sir.

Q. And your testimony in brief is that you had no knowledge of any prohibition against transients? A. Exactly.

Q. My question is: Did you at any time on behalf of one of your clients request permission from FHA to rent to transients? A. No, sir.

Q. Did you at any time have any discussions with
134 FHA officials as to whether transient rentals were permitted? A. None that I remember. The question was never posed as far as I recall.

Q. Did you advise your clients that they could rent to transients? A. Not that I recall. I don't remember it ever being discussed.

Q. So that your testimony really means that in your opinion upon reading the charter there was no prohibition contained in the charter? A. That's correct, yes.

Q. Thank you. That is all.

The Court: Mr. Barnes, did you ever have any discussion with any FHA official as to what was meant by reserving to the Federal Housing Commissioner the right to regulate methods of operation? I know rates, I know what rental rates and all of that is concerned, but did you ever have any discussion and if so with whom, any FHA official as to what was meant by the term of the Federal Housing Commissioner regulating methods of operation? As provided for in the act, I believe.

A. Well, from time to time, when we closed these projects, I discussed it in a general sort of way with Mr. Frank Massey, who in the early FHA days, that is, 608
135 project-wise, would come to Columbia and close these projects, and we discussed various and sundry items. And in each case, when we would get ready to close a project, he would furnish our office with a sample charter, and from time to time those charters would have additional prohibitive sections inserted in them, from time to time. They would find a little hole that they would want to button up and he would send me a new sample

charter and suggest that I use it in future closings. But I don't remember ever talking to Mr. Massey about this renting for a shorter period than 30 days, but I always assumed—I can't cite anything specific,—but I assumed that anything that was not prohibited in the charter itself was permissible, just in a general sort of way.

The Court: You have no recollection of ever discussing or saying to Mr. Massey, or anyone else, "Well, what is meant in the act here as to the right of the Federal Housing Commissioner to regulate methods of operation?" Of course that is typical government language. You expect it to be ambiguous if it was put out in Washington, and that is true whether it be out of one administration or another. But what is meant by "methods of operation?" I am frank to say I don't know.

A. Well, I would presume that the owner-corporation could do anything other than what was specifically
136 prohibited in the charter. It was a very lengthy charter and they took great pains in spelling out in detail certain things that you could not do. And other than that, I would assume that you could do anything that a normal business corporation could pursuant to our South Carolina law.

The Court: But the question never came up?

A. No, sir.

Mr. Eardley: May I ask just a few more questions?

The Court: Yes. Both of you may.

Recross Examination

By Mr. Eardley:

Q. I understood you to state that you represented between 30 to 50 of these 608 corporations? A. I would guess that, yes, sir.

Q. And how many of these corporations, other than the Darlington, have been renting to transients? A. I am really not in a position to say.

Q. Do you know of any? A. Not firsthand, no, sir.

Q. Did you in your discussions ever advise your clients as to their right to furnish apartments and to rent them furnished? A. You are not asking about the 30-day period?

Q. No. I am talking about the furniture. A.
137 I have had discussions with one or two clients with

regard to that. I wouldn't say I advised them either way. I have had discussions with one or two clients.

Q. When did you last have occasion to discuss the rights of your clients with respect to Section 608 operation? A. Gosh, I couldn't answer that truthfully.

Q. Several years ago? A. 608 clients, I would guess that some of them call us once a month, at least, and have been since we closed these projects.

Q. Did any of your clients come to you and inquire as to their right to install furniture without the approval of FHA? A. I have been asked that question, because that is one of the things I can remember discussing with Mr. Massey. That is the principal thing I can remember discussing with him, the right to furnish but not the right to rent for a period of less than 30 days, but I have never rendered a formal opinion. I have discussed it on several occasions with clients.

Q. Did Mr. Massey advise you that under the FHA rules and regulations and directives that furniture could not be installed without getting approval? A. Well he didn't give me a formal opinion, just like I never gave one to the client. It was his off-the-cuff opinion that if the
138 owner-corporation did not own the furniture that it could be furnished and come within the FHA regulations.

Q. What position did he hold? A. For instance, in this case, the Long Corporation could rent and furnish 10 apartments, could furnish them and rent them and charge whatever they wanted to for the furnishings, so long as the Darlington—that is the name of the owner-corporation,—so long as the Darlington didn't rent them furnished. Now I didn't know I was going to be put on the stand and I haven't thought about these things for a long time.

Q. I am talking now about your conversation with Mr. Massey. My question was: What position did he hold? A. Yes. Well, that is what I am talking about. I am trying to give you just a tiny bit of background on it.

Q. I still don't know what position he held. A. It was his opinion that an outside corporation could rent a portion of the apartments, furnish them, and in turn rent them again and they would not have to get permission from the FHA as to what the furnishings would be rented

for. There was one prohibition that the owner-corporation could not rent the entire unit, I think. That is my memory. Without getting permission from the FHA.

Q. What position in the FHA did Mr. Massey hold? A. He held—it was his opinion—

139 Q. No, I asked you: What was his job? A. Oh, excuse me. He was Zone Attorney.

Q. Zone Attorney. A. Yes, sir.

Q. And as I understood your preliminary remarks to infer that these were not opinions given him as the opinion of the agency, but his—what you call—off-the-cuff observations? A. That's right. As lawyer to lawyer, we discussed that while he was in town.

Q. You were just discussing this as friends? A. Yes, sir.

Q. And not in the course of seeking an official opinion? A. That's correct.

Mr. Eardley: I move that the testimony be stricken.

The Court: I overrule the motion because I don't know who would render an official opinion. Who rendered them for the FHA?

Mr. Eardley: I don't know whether Mr. Massey does or doesn't, but obviously here he does not.

The Court: Well, who does?

Mr. Eardley: The Commissioner of FHA.

The Court: I will overrule the motion. I think it is permissible for what it is worth. I don't think it is worth much.

140 Redirect Examination

By Mr. Long:

Q. Mr. Barnes, summing up, in the 35 to 50 of these loans, at no time did anybody connected with the FHA ever indicate to you that there was any intent of the FHA that no apartment in the building could be rented for 30 days or less? A. They never did. I never heard it mentioned.

Mr. Eardley: Mark this as government's Exhibit No. 1 for identification.

Q. What was the date of the last 608 project that you handled and closed? A. I would guess it was back about '50 or 51.

The Court: Mr. Eardley has handed to the Clerk a document which he desires to be marked for identification, and it will be marked as Defendant's Exhibit No. 1 for identification.

Mr. Long: No objection, your Honor. As a matter of fact, we want it in.

The Court: Let it be admitted in evidence then as Defendant's Exhibit No. 1, 1 and 1 (a). Are there two documents, Mr. Eardley?

Mr. Eardley: There is the directive with a form attached.

The Court: Mark it 1 and 1 (a), Defendant's Exhibit.

141 LETTER from Clyde L. Powell, Assistant Commissioner, to Directors of all Field Offices, with Form attached, marked in evidence as *Defendant's Exhibit 1 and 1 (a)*, dated January 3, 1952.

Re-Recross Examination

By Mr. Eardley:

Q. Did Mr. Massey ever call your attention to a Directive received by this office on or about January 3, 1952, in which it stated that it was the policy of the FHA that there be no transient rentals? A. Mr. Massey hasn't been in this territory since long before that period. He closed loans in the early days, and I would say he left in '49 or '50.

Q. So that these conversations, informal conversations that you had with him were before 1950? A. Yes.

Q. And you have had none since? A. Not since about '51, I am sure. I haven't had any with him in 1952.

Mr. Long: I understand the letter is in evidence?

Mr. Eardley: Yes, it is.

Mr. Long: I want to be sure of that.

Mr. Eardley: That is all.

The Court: Thank you, Mr. Barnes.

. . . . . .

146 Offer in Evidence

Mr. Long: Your Honor, there is an FHA form and I have got it if the Court will just bear with me a minute, in which in 1952 was set out that in all 608 mortgages

147 hereafter the stipulation should be put in that there will be no 30-day rentals.

The Court: All right.

Mr. Long: I have got it. Your Honor, we would like to offer in evidence the letter of Clyde L. Powell, Assistant Commissioner, dated February 15, 1952, to which is attached a covenant that must be made a part of all 608 mortgages after March 1, 1952.

The Court: Let it be admitted as Plaintiff's Exhibit No. 41 and 41-a, the attached covenant.

LETTER dated February 15, 1952, from Clyde L. Powell, Assistant Commissioner, to Directors of all Field Offices, marked in evidence as *Plaintiff's Exhibit No. 41*, and attached COVENANT marked in evidence as *Plaintiff's Exhibit No. 41-a.*

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159 **Offer in Evidence**

Mr. Eardley: We would like to offer an affidavit of Adolphus M. Prothro, the Acting General Counsel, which I know you will be interested in.

Mr. Long: Mr. Prothro is with the Housing and Home Agency now, isn't he?

Mr. Eardley: No.

Mr. Long: No?

Mr. Eardley: You are thinking of Frank Mystroud.

Mr. Long: Oh, that's right.

The Court: This is the affidavit that Mr. Long mentioned that he would want the right to cross examine on?

Mr. Eardley: Right.

The Court: Let it be admitted as Defendant's
160 Exhibit No. 6, subject to the right of counsel for the plaintiff to properly cross examine the affiant in the event counsel shall request it.

Mr. Long: And we object to it further, your Honor, on the ground that interpretations of the Federal Housing Act must be promulgated in the form of regulations, if they are to have any effect at all.

The Court: Well if that were the case, then I would have to run out all of Mr. Barnes' testimony, wouldn't I?

Mr. Long: Well I am going to say this, your Honor: Mr. Eardley didn't object.

The Court: What is fair for the goose is fair for the gander.

Mr. Long: Well I think you are right.

AFFIDAVIT OF ADOLPHUS M. PROTHRO, dated September 22, 1955, marked in evidence as *Defendant's Exhibit No. 6*, subject to right of counsel for Plaintiff to cross examine affiant.

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161 T. E. STEADMAN, SWORN

Cross Examination

By Mr. Eardley:

Q. Mr. Steadman, how long have you been with the Long —I mean the Darlington Corporation? A. Since it was organized.

Q. How long ago was that? A. That was in 1949, I believe.

Q. And who are the principal stockholders? A. The Long Corporation is the principal stockholder. Mr. L. D. Long has one share, Mr. Leonard L. Long one, and I have one.

Q. And who are the principal stockholders of the Long Corporation? A. L. D. Long.

Q. And this Long Corporation that I am referring to is the one that rents the furniture, isn't it? A. Yes.

Q. When was it that you first began installing furniture in the Darlington? A. I believe probably around September or October 1949. I am not absolutely sure of that date.

Q. At that time were you renting to transients? A. I don't think so. I just don't remember. I don't recall.

Q. When did you make your last furniture pur-
162 chase for installation into the Darlington? A. I think probably it has been about 10 or 12 months ago.

Q. In 1954, sometime? A. I think it was in '54, yes.

The Court: I understood you started buying the furniture in 1949, October of 1949? A. Yes, sir.

The Court: Furniture to go into the Darlington? A. Not 1949. I am sorry. 1951.

The Court: Well now let's get this straight, Mr. Steadman. You know, I can't be a mind reader, and when I read what that lady types up, that is your testimony. If you don't know, you can get your records any time you want them. A. I am sorry, your Honor. I didn't mean to make a mistake. It was in 1951 when we first purchased furniture for the Darlington.

Q. At that time did you make an application for—did the Long—not Long—the Darlington Corporation apply to FHA for permission to rent furnished? A. Not that I recall, no.

Q. And it is a fact, is it not, that the Darlington has never applied to the FHA for permission to rent the
163 apartments furnished? A. Not that I recall, no, sir.

Q. And it is also a fact that the rental of the furnished apartments exceeds the amount in the approved schedule? A. It exceeds the amount approved for unfurnished apartments.

Q. That is right, isn't it? A. Yes, sir.

Q. Is it correct that you charge $15 to $20 a month for furniture to tenants who are there on a monthly basis? A. Yes, sir.

Q. And is it correct that you charge approximately 3-plus dollars a day to transients who rent on a daily basis? A. We charge $6 a day for apartment and furniture.

Q. For apartment and furniture? A. Yes, sir.

Q. And you transmit to the Long Corporation $3 or more of that for the furniture account, is that right? A. Yes, whatever the difference is between the daily rate for the unfurnished apartment and the furnished apartment.

Q. So that the rental of furniture to transients is $90 a month, and the rental of furniture to monthly tenants is $15 to $20 a month? A. I beg your pardon; I didn't get that.

Q. I say, the rental to transients,—I mean, on a daily basis, if you rent by the day you collect about $90
164 a month don't you, for furniture? A. If we rent it every day for $6 a day, yes, sir.

Q. Yes. If you rent by the month, you collect $15 to $20? A. Yes, sir.

Q. And you adopted that procedure in order to charge to the Darlington Corporation 1/30th of the approved schedule, isn't that correct? A. Yes, sir.

Q. So that the furniture is simply whatever is over and above 1/30th? A. That's right; 1/30th of the approved monthly rental, yes, sir.

Q. I believe that your affidavit indicates that your corporation has until recently been losing money? A. Yes, sir.

Q. Is that an actual out-of-pocket loss? A. That includes the depreciation charge.

Q. Have you invested additional capital in the corporation? A. We did, yes, to begin with.

Q. When? A. When we first began operating. We had to put money in every month.

Q. Have you invested any capital in the last two
165 or three years? A. I would say not in the last two years, probably.

Q. Have you distributed any of the depreciation as surplus? A. No, sir.

Q. So that that amount is still in the hands of the corporation? A. Well, no, it has gone to pay off loans made from Long Corporation to operate on to begin with.

Q. You mean that this depreciation was loaned to the Long Corporation? A. No. Let me put it this way: The corporation has lost money from an accounting standpoint after charging depreciation. Now, probably for the last year or eighteen months, there has been an accumulation of surplus cash.

Mr. Long: Surplus what, Mr. Steadman? A. Cash. Due to this depreciation being charged, which of course is not paid for. Now, as I said a few minutes ago, the Long Corporation to begin with advanced money to the Darlington for operating capital. They had to advance money every month to make the mortgage payments, and maybe to meet payrolls. So, what money has accumulated in the last year or eighteen months has been paid back to Long Corporation against that loan.

Q. Are you telling me that at the time of the final commitment, when the construction was completed,
166 that this corporation, the Darlington, was indebted to the Long Corporation? A. I say, the Long Corporation advanced money for its operation, when they first began operations.

Q. My question was: At the time of the final commit-

ment, when the job was completed, was the Darlington indebted to anyone? A. Not that I recall, sir.

Q. What was that? A. I would have to go to the books to check that, but I don't remember that they were.

Q. I suppose you are familiar with the requirement that they have to certify that there were no debts? A. Yes.

Q. The building was completed, wasn't it, in 1951? A. 1951.

Q. So that at that time it started out free and clear of any debts to the Long Corporation? A. I think so, yes.

Q. Now, my question is: What has happened to the depreciation surplus that has accumulated since that date? A. I will explain it to you again, sir. When the Darlington first began its operations, it lost money, because we could not get the tenants. We had mortgage payments to meet every month. We had payrolls to meet every month.
167 We had repairs to make. And we didn't have the money. The Long Corporation loaned the Darlington, Inc., the money for that purpose, thousands of dollars. I think probably it was $35,000 or $40,000 that it finally reached. Now, since the Darlington has been accumulating cash over the last year or eighteen months, they have been reimbursing the Long Corporation for that advance.

Q. In considering depreciation, what rate have you taken? A. 2 percent on the building and I believe about 7 on the equipment.

Q. Over what period of time? What is the economic life of this building? A. 50 years.

Q. And you are on a straight line 2 percent depreciation? A. Yes.

Q. But the depreciation you set down in the books is more than that, isn't it? A. It is 2 percent on the building.

Q. On the building and what else? A. 2 percent on the building and I think it was 7 on the equipment. That is my recollection of it.

Q. Most of that goes into the replacement account, doesn't it? A. No. What do you mean?

Q. Reserve for replacements. A. I mean, what is
168 the connection? I don't follow you.

Q. There is a reserve for the replacement account that comes out of depreciation, is that right? A. No. That

is put up in cash. It is not connected with depreciation at all. I mean, as far as the book depreciation account is concerned. It is two separate accounts entirely.

Q. Well, in other words, under your system of bookkeeping you set up depreciation in one account and you set up another account as reserve for replacements, is that right? A. Yes.

Q. So you consider this depreciation account as cash surplus available for payment of debts of the corporation? A. Yes, sir.

Mr. Eardley: Mark this (handing).

The Court: What do you set up for reserve for replacements? A. $342.75 a month. That figure is set up by the Federal Housing Administration.

Q. And that is not available to you, is it? A. No, sir. It is, if we request it and get permission from the mortgagee and the FHA, I believe.

The Court: In effect, Mr. L. D. Long then controls the Long Corporation and through his ownership of the
169 stock in the Long Corporation, which is the principal stockholder in the Darlington, he controls the Darlington. Am I correct? A. Yes, sir, that's correct.

Q. Were you in contact with Mr. Leffler when he came down there? A. Yes, sir.

Q. And you watched his operations, did you not? A. Well, I wouldn't say that exactly. We just turned it over to him to find whatever he wanted to.

Q. Yes. Now, I hand you Defendant's Exhibit 7 for identification and ask you to tell me if you are familiar enough with your books and records to state whether or not that is a fair presentation of your net income and depreciation account? A. That is about it, according to my recollection of our books and records, yes, sir.

Q. Did he seem to be competently doing his work? A. Yes, I think so.

Mr. Eardley: I offer this in evidence.

Mr. Long: No objection.

The Court: Let it be admitted as Defendant's Exhibit No. 7.

STATEMENT SHOWING NET INCOME BEFORE AND AFTER DEPRECIATION marked in evidence as *Defendant's Exhibit No. 7.*

170 Q. Were you an officer of the Darlington Corporation? A. Yes, sir.

Q. From the inception? A. Yes, sir.

Q. Were you one of the sponsors? A. No, sir.

Q. Were you at all active in attempting to get the commitment through? A. Only to this extent: I would say that anything Mr. Long would ask me to do in connection with it naturally I would do.

Q. Did Mr. Long consult with you on problems that arose in connection with the commitment of this project? A. I wouldn't say so, no, sir.

Mr. Long: I didn't hear that question, Mr. Eardley. I am sorry.

Mr. Eardley: I asked him if Mr. Long consulted with him about the problems of getting the commitment.

Q. There has been an inference left here that FHA was more or less imploring you to build this apartment. Isn't it a fact that the chief underwriter of FHA strongly protested this commitment and it was turned down initially and was finally sent to Washington where approval was given by the Zone Commissioner? A. I couldn't give you

171 the history of that, sir.

Q. You don't remember that at all. A. I couldn't say yes or no to that.

Q. You had no discussions with Mr. Long about the trouble he was having in trying to get this thing through locally? A. I don't think so. I don't recall anything like that, sir.

Q. Did you examine the schedules which were submitted in Mr. Leffler's affidavit? A. I looked it over, yes, sir.

Q. And did they seem to represent the facts? A. I think so. I think they are accurate.

Q. That is all.

Mr. Long: Have you got those things that we were going to have Mr. Adickes to introduce? There were three things. Let me check those, Mr. Adickes, those three.

Direct Examination

By Mr. Long:

Q. Mr. Steadman, when the FHA in 1952 wrote this—do you remember receiving that letter from the FHA in 1952 (handing)?

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173 COPY LETTER dated December 5, 1952, from W. W. Adickes to T. E. Steadman, marked in evidence as *Defendant's Exhibit No. 8.*

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Q. Mr. Steadman, I refer now to Defendant's Exhibit No. 8. You say you received that letter? A. Yes, sir.

Mr. Long: In order to short circuit things, your Honor, the letter states in substance that the FHA has found out that they were renting furnished apartments and that there had never been any request for them to approve furniture rentals, and told the Darlington in December 1952

174 that they should request approval of the furniture rental, and it served notice on them, however, that before any approval of the furniture rental would be made, they had to enter into an agreement not to rent any of their furniture for less than 30 days.

The Court: Those are the exhibits that are attached to the complaint?

Mr. Long: No, sir. This was in 1952.

The Court: '52?

Mr. Long: Yes, sir. Now, this May 3 letter is addressed to Leonard L. Long.

Q. Mr. Steadman, you did not receive that. It is in evidence and we will read it at the proper time. Now, this will also be referred to later. Mr. Steadman, the furniture rent that is charged for the Darlington Apartments, for the furniture alone, that goes into any vacant apartment, what is the monthly charge based on? A. How do you mean, "what is it based on, Mr. Long?

Q. Is it based on the cost of the furniture and you take a certain portion of it each month, or how? A. Well we tried to get it as close to that as we could. That is, I would say, approximately 1/48th of the cost.

Q. 1/48th. A. That is when it is rented for 30 days or more.

175 Q. Each month you collect 1/48th? A. That is right. That is approximately.

Q. Don't you know that it is a regulation of the Federal Housing Administration that they will approve 1/48th of the rental cost each month for furniture? A. I have understood that that was their schedule.

Q. And do you know whether there has been something introduced in evidence today that verifies that fact? A. I don't know that.

Q. You don't know that. All right. Now, Mr. Steadman, the charge for an apartment that is rented, we will say for example, for one day, you state the charge on that is what? A. $6.

Q. $6. Did you bring with you a form of receipt that the Darlington gives to the tenant or submits to the Long Corporation? A. Yes. I have some back there.

Q. Where is that form? A. In that file folder there, please. Let me have the folder also, that file folder.

Q. I refer you to a book captioned "The Darlington, Charleston, South Carolina," receipts No. 12801 through 12850.

Mr. Long: Let me show this to counsel now. We
176 intend to offer it in evidence, your Honor. We are going to tear some out of there and give them to you.

Q. Is this the form of receipt that the Darlington gives to the tenants who occupy less than 30 days? A. Mr. Long, let me have that folder there just a moment, will you? I mean, I don't handle these receipts and I want to be careful. I don't want to say something that isn't the truth.

Q. That is right (handing). A. It seems to be, yes, sir.

Q. All right.

Mr. Long: We would like to offer this form of receipt in evidence.

Mr. Eardley: I should like to ask one or two questions here.

Mr. Long: Okay. Do you want to do it right now?

Mr. Eardley: Well I don't want to admit them unless I am sure.

Mr. Long: Okay.

Recross Examination

By Mr. Eardley:

Q. When was this type of receipt first used by the Darlington? A. I couldn't answer that question,
177 sir. I just don't remember.

Q. It is obviously a new book, isn't it? A. Oh, this is a new book that has not been used. Now, of course we have other books.

Q. Yes.

Mr. Long: I had him bring old receipts, Mr. Eardley.

Q. Do you know how long this has been used? A. No, sir.

Q. You don't know whether it has been used one month or three years? A. I know it has been longer than one month, but that is all I could answer.

Mr. Eardley: Well, on that basis, I have no objection.

The Court: Let it be admitted as Plaintiff's Exhibit No. 42.

RECEIPT FORM No. 12801 marked in evidence as *Plaintiff's Exhibit No. 42.*

The Court: Now, Mr. Long can provide the date of Receipt No. 1 of that form.

Mr. Long: We have a gentleman here who will
178 testify that this receipt, substantially in this same form, has been used since the opening of the building, —Mr. Finley back there.

The Court: Of course, "substantially the same form,"—

Mr. Long: Well he can explain what difference there is, if any.

Had you finished, Mr. Eardley?

Mr. Eardley: Yes.

Direct Examination

By Mr. Long (continued):

Q. Mr. Steadman, did you bring with you, picked at random from the files, certain receipts—copies of receipts that have been given to various people who occupied the building? A. Yes, (handing).

Q. They are all in 1954. Have you got any receipts prior to that date? A. I haven't got any with me prior to that date.

Q. But there are some available? A. Yes, there are some available.

Q. Now, Mr. Steadman, taking Receipt No. 6,608, to a Mr. Oliver M. Roberts, for example, what does it show there as to the rent the Darlington received from that $6? A. $2.58, and $3.42 to the Long Corporation.

Q. To Long Corporation. A. Yes.

179 Q. Please state in reference to furnished apartments that are rented, we will say, for one day. Who pays the janitor to clean up the room? A. On the furnished apartment, that is paid by the Long Corporation.

Q. The Long Corporation. A. Yes, sir.

Q. Does your book that you have in court reflect that? A. Yes, sir.

Q. Who pays for the laundering of the linen that is used? A. Long Corporation.

Q. And who pays for the electric lights that go into the apartment? A. The Darlington.

Q. The Darlington Corporation. A. Yes, sir.

Q. And the amount that is subtracted from every payment for less than 30 days, when it is rented furnished, is that based upon the per day prorata rent of the established rent for the vacant apartment? A. Would you ask that question again, Mr. Long.

Q. All right, sir. I will put it more simple. The rent that the Darlington keeps for itself, out of rooms that are rented for less than 30 days, is that based upon 1/30th per day of the established rental, as it is called, for

180 the vacant apartment? A. Yes, sir.

Q. In reference to rent collected for daily occupancy of the apartments, when is that money turned over to the Long Corporation? A. We don't have any special time; maybe once a month sometimes, or twice a month sometimes.

Q. No special time. A. Certainly I will say this: It is paid in full each month.

Q. Mr. Steadman, I am not much on accounting. Perhaps you can verify it better than any man in the world. But a building does depreciate after it is built, doesn't it? A. Yes, sir.

Q. Its value goes down. A. Yes, sir.

Q. The income tax people are allowing you this 2 percent depreciation, aren't they? A. Yes, sir.

Q. And you don't think age has actually improved that building, do you? A. No, sir.

Q. It has depreciated. A. That's right.

Q. Now, Mr. Steadman, have you ever heard of, in any kind of accounting, that your depreciation reserve is to be considered as surplus? A. Not as an earned surplus, no, sir. You might consider it sometimes as—

Q. What kind of surplus is it? A. —a cash surplus, you might say. But certainly for bookkeeping purposes you do not consider depreciation as any part of your earned surplus or any cash that may have accumulated from that is not a part of your earned surplus.

Q. In accounting practices then, depreciation is considered the amount that is deducted from money collected from the building in order to repair or replace it? A. Yes, that is supposedly what it is for.

Q. What is it for. Now, Mr. Steadman, you have to submit to the FHA annually, don't you, a statement on a form that they submit to you about the income from the building and what-not? A. They do not submit us a form, but they submit a list of questions that they want answered in that report, and we follow that list.

Q. And that has been submitted each year since the building has been opened to the FHA? A. Yes, sir.

Q. And since this building has been opened, I believe you have an affidavit in this record that shows that the total operating loss has been $77,000 approximately, is that it? A. Well, I haven't got the figures in mind. It is whatever that shows there.

Q. And Mr. Steadman, a gentleman came down from the FHA since we were up in Norfolk, isn't that right? A. Yes, sir.

Q. And he was a certified public accountant? A. So he said, yes, sir.

Q. And he checked all of your records. A. Yes, sir.

The Court: Mr. Steadman, how many shares of stock are issued and outstanding in the Darlington, Inc.? A. 100 shares of preferred stock, that goes to the FHA.

The Court: That goes to the FHA. A. At $1 per share.

And then there is — the amount of money involved is $125,000. That is 1250 shares at $100 a share. I believe that is the way that works out.

The Court: And out of that, you own a share, one share? A. Yes, sir.

The Court: And Mr. L. D. Long one share? A. L. D. Long one share, and Leonard L. Long one share.

The Court: And the rest of the stock is owned by
183 the Long Corporation? A. Yes, sir.

The Court: How many shares of stock, if you know, are issued and outstanding in the Long Corporation? A. I believe it is 1819. I think the capital stock right now is $181,900. Mr. L. D. Long owns all of that with the exception of a qualifying share for Leonard L. Long and one for me.

The Court: You have a qualified share and Leonard L. Long has a qualified share? A. Yes, sir.

The Court: By "qualified share," you mean a share for voting purposes? A. Yes, sir.

The Court: Actually, you have no financial interest in that particular share of stock, and neither does Mr. Leonard L. Long? A. I am sure I do not. As far as he is concerned, I don't know.

The Court: You can't speak for him, of course. A. No.

Q. Mr. Steadman, at the time the furniture in 1951 was placed in this building, did I ask you to bring the books that would show whether or not the Darlington Apart-
184 ment had funds with which that furniture could have been bought? A. Did you ask me what, Mr. Long?

Q. Do you know of your own knowledge or do you have books here that will show whether or not at the time the furniture was bought by the Long Corporation and placed in the Darlington Corporation they had any funds with which they could have purchased the furniture? A. No, the Darlington did not have the funds to purchase the furniture. I can state that definitely.

Mr. Long: The witness is with you, Mr. Eardley.

Recross Examination

By Mr. Eardley:

Q. The Darlington Corporation had pretty good credit with the Long Corporation. You say that it borrowed

money. It could have borrowed money for the furniture, couldn't it? A. I don't know about that, sir.

Q. You don't know. That furniture, I think, from my understanding, cost about $850 to $900 an apartment, isn't that correct? A. I think that is approximately correct.

Q. And the apartment itself runs around $5,000 a unit, doesn't it? A. Yes, sir.

185 Q. And you charged $2 and something for the apartment, and you charged $3 and something for the furniture, is that it? A. Yes, sir.

Q. With respect to the furniture that is rented to transients, you don't pretend that you are charging 1/48th? A. No, sir.

Q. It is much more, isn't it? A. Yes, sir.

Q. And the 1/48th, was that a calculation or was that just an arbitrary figure which was— A. It was—let me answer the question this way, if you will, please, sir: It was a calculation to this extent: Our purchase of furniture for the Darlington has been at different prices. Maybe it cost us $750 when we bought this time, and maybe the next time it was $850 for the apartment. We have tried to establish more or less an average in there, about 1/48th of the cost.

Q. And do I understand correctly from your answer that you were attempting in setting up this 1/48th figure to comply with what you knew to be FHA regulations? A. Well, we of course had that in mind. We understood that is what they required.

Q. But you didn't make an application to the FHA for permission to rent furnished apartments? A. No, sir.

186 Q. Did I understand you to testify that these receipt forms which have been offered in evidence were and are signed by anybody who comes in there for a night's lodging? A. The receipts are signed by anyone who comes—

Q. I mean, are delivered to. Suppose I had come to the Darlington, which I would have done had it been a little closer. A. We would have been glad to have you.

Q. Would I have been given one of these receipts when I check out today? A. If you requested it, yes.

Q. If I didn't request it, would you have handed it to me? A. Yes, sir. Not me, but those of course in the Darlington who handle that.

Q. So that every nightly guest is given this when he leaves to show his $6? A. Let me say it this way: That receipt is prepared in every case and the receipt is there for them if they want it. They are put on the desk for them, and some of them take it, you know, and throw it away, and some leave it on the desk. But they are offered to everyone who comes in that building.

Q. That is all.

Redirect Examination

By Mr. Long:

Q. Mr. Steadman, isn't a copy of that receipt one
187 of the records that is delivered by the Darlington Corporation to the Long Corporation, by which you adjust the accounts between each corporation? A. Yes, sir.

Q. That is part of the records? A. That is done with the daily report each day.

W. W. ADICKES, SWORN

Direct Examination

By Mr. Eardley:

Q. Mr. Adickes, I think you are going to need your file. Can I get it for you? A. Yes.

Q. Will you state your full name? A. W. Withers Adickes.

Q. Your address? A. 3806 MacGregor Drive, Columbia.

Q. Your occupation? A. I am the Assistant Director of the Federal Housing Administration, Columbia.

Q. Pursuant to my directions or the directions of Mr. Howe, did you attempt to find the correspondence which flowed between the FHA and the Darlington concerning transient and furniture rentals? A. Yes.

Q. I hand you Defendant's Exhibits 8 and 9, and
188 ask you if those two letters constitute all of the correspondence that you could find on that particular subject? A. Yes.

Q. Did you also, pursuant to my direction, go through the file to determine what directives had been issued regarding furniture and/or transient rentals? A. Yes.

Q. And did you furnish to me the Defendant's Exhibit No. 1 as one of the directives which was received on or about the date mentioned? A. It is no doubt the same thing. I didn't furnish this.

Q. Well, I mean, you have got a copy? A. Yes, I have.

Q. You have got a copy of this? A. Yes.

Q. I got this in Washington. I also show you Defendant's Exhibit 10 and ask you whether or not that is a directive which was received by your office on or about the date indicated? A. It is.

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189 DIRECTIVE dated August 10, 1951, addressed to Directors of all Field Offices from Clyde L. Powell, Assistant Commissioner, marked in evidence as *Defendant's Exhibit No. 10.*

Q. Now, Mr. Adickes, I have asked you to go through your records to see whether or not there was any disagreement in opposition in the FHA office to the issuance
190 of this commitment. A. There was objection by some.

Q. And by whom was the objection made? A. The Chief Underwriter at that time, Mr. Baxter, I believe.

Q. Was that in the form of a communication? A. There is a memorandum in the file from Mr. Baxter.

Q. Would you produce it. A. I believe so. Do you wish it out?

Mr. Eardley: Your Honor, this is on what I regard an entirely irrelevant matter. They made so much of a point of it, I thought that I would—

Mr. Long: We are not going to make any point of this, unless you have some questions to ask, your Honor.

Q. Well, the record shows that Mr. Baxter did oppose the commitment? A. Correct.

Q. He was the Chief Underwriter? A. Yes.

Q. What happened then? A. The Director and the Chief Evaluator favored issuance of the commitment and one was issued.

Q. But was it issued after a directive from Washington or was it issued without a directive from Washing-
191 ton? A. The Washington office directed the local office to issue the commitment, is my recollection.

Q. Is it true that in view of the dispute the matter was submitted to Washington for decision? A. Yes.

Q. After this dispute arose, did the Long Corporation withdraw its application? A. It withdrew an application. I don't think this one was ever withdrawn.

Q. I beg your pardon? A. One application was filed and withdrawn. This application was not withdrawn.

Q. I don't follow you. What do you mean by "this?" A. There is an application in this file which resulted in our insurance of a mortgage.

Q. Yes. But was the first application withdrawn and then a second application submitted? A. That is correct. The first application was withdrawn and a second one was submitted.

Q. Just tell us briefly what was the chief objection to this particular commitment. A. Many thought the location would prove unsuccessful.

Q. Does the file show whether or not the Darlington Corporation ever executed a form which was attached to the letter 214 by which the mortgagor agreed not to
192 rent to transients? A. No.

Q. It never did? A. It never did.

The Court: Did your office or any other office ever insist upon the execution of that form? A. Yes. Yes, sir, we have attempted. Yes, we have insisted that the form be executed. It is a letter which assures FHA that tenants won't be accepted for fewer than 30 days.

The Court: Well when is that generally executed? Before the money is disbursed? A. No, sir. Before a rental schedule is approved, which contemplates furnished apartments.

The Court: Well in this particular case, then why didn't your office before they approved this rental schedule insist that that form be executed? A. It was then indicated that no apartments were rented furnished. They were to have been rented unfurnished.

The Court: Well that has nothing to do with the less than 30-day period. You could rent an unfurnished apartment for less than 30 days, couldn't you? A. Yes. Of course—

193 Q. I beg your pardon? A. Of course you could rent an unfurnished apartment for less than 30 days.

Q. You mean, you could legally or you could practically?

Mr. Long: Now, this is his witness, your Honor. I object to the leading of this man.

Mr. Eardley: Well, I mean, I don't think he—

The Court: He said you could. Now, I know from a practical standpoint that it is unlikely that people are going to move furniture into an apartment for a period of even 30 days. There is no magic to the words "30 days." This is the first mention of it and I understood you to say, Mr. Eardley, that there was attached to some form 214 a statement that they were supposed to tear off, —I haven't seen it, and execute it whereby they agreed that they wouldn't lease any apartment for less than 30 days, and that that was a part of the—or was to be approved before the rental schedule.

Mr. Long: If I may interrupt, your Honor, that didn't come into effect until 1952, the form he referred to.

The Court: That is the same thing you are
194 talking about, as to those Exhibits, Plaintiff's Exhibit No. 24 and—

Mr. Long: No, no, that is a separate form, your Honor, that we introduced. You remember I asked my secretary to help me find it. That was the form. And it is also shown by this letter that Mr. Eardley asked Mr. Adickes to identify and which he stated came from Washington. The date of the letter shows that.

Mr. Eardley: Your Honor, here it is (handing).

The Court: That is January 3, 1952.

Mr. Long: Yes, sir.

The Court: Well, of course, then you don't mean, Mr. Adickes, that before the first rental project was approved, —you don't mean that you tried to get the Darlington to execute this form? A. No, sir. We didn't attempt to—

The Court: That was sometime after that? A. Quite some time, yes.

The Court: Well, I was confused as to that.

That is why I went into the situation.

Q. Well, let me ask you this: I am confused about your statement that you could rent unfurnished apartments for less than 30 days. Did anyone ever
195 apply— A. I will withdraw it. I don't want to

argue about it. I think you could, but if you think you couldn't, I will agree with you.

Q. Did anybody ever apply to you for permission to rent for less than 30 days, unfurnished apartments? A. No.

Q. You were never called upon to pass upon that question, were you? A. No.

Q. When was the final date of the final commitment?

Mr. Long: It is on the back of the note in evidence, your Honor, September 12, 1951. A. Quite right, September 12, 1951.

Q. That is all.

Cross Examination

By Mr. Long:

Q. Mr. Adickes, all Gaul is divided into three parts, so said Judge Bailey when he recommended this project, didn't he? A. I believe he said that.

Q. Yes, sir. And it is in that file, isn't it? A. (no answer).

Q. Mr. Adickes, doesn't your file contain a letter there from Judge Bailey, the State Director of the Federal Housing Administration, in which he states that he
196 had lived in Charleston in 1934, and he gets a little humorous and says "Like Gaul, Charleston is divided into three parts," and that he knew this location and it was an excellent one? A. Yes, sir.

Q. And isn't there a letter in that file from a man named E. L. Allison, who was the Chief Evaluator for the Federal Housing Administration, who states that he was well acquainted with Charleston and that he considered the site an excellent one? Isn't that right? A. Yes, sir.

Q. Isn't it true, Mr. Adickes, that the Federal Housing Administration held a public meeting in Columbia to attempt to promote sponsors for these 608 projects? A. Yes, that is true.

Q. Didn't your office, pursuant to instructions from Washington, do everything that it knew how to promote 608 projects? A. Yes.

Q. Isn't it true, Mr. Adickes, that Judge Bailey approached L. D. Long here and urged the construction

of this building on this site? A. I don't know it, but I have understood that that was the fact.

Mr. Eardley: Just a minute. I object to any hearsay testimony.

197 The Court: That would be right remote. Where is Mr. L. D. Long?

Q. Were you present at any conference between Judge Bailey and L. D. Long when Judge Bailey urged upon him the construction of a 608 project upon this site? A. I do not recall that I was. I may have been, but I sure don't remember it.

Q. Isn't it true, Mr. Adickes, that at the time the first application for this project was being submitted that the lot had been approved by Mr. Allison, whose job it was to approve lots? A. I think so.

Q. Yes, sir. Do not the records in that file show so? Or you don't know? A. I don't know.

Q. But it was the job of Mr. Allison to approve sites before construction could start. He was the man who was out in the field approving sites. A. Yes, he was.

Q. And there is a letter in there where he approved it? A. Yes.

Q. Isn't it true, Mr. Adickes, that at the time the first application was withdrawn, the demolition of the buildings on the site, in anticipation of the construction of the

198 Darlington, had already taken place? A. I don't know, sir, and I don't know how you could learn.

Q. You don't know that. Now, Mr. Adickes, there is something here about—the Judge asked you and I want to clear it up,—about the requirement that was attached to a 608 project that the owner of the project had to agree not to rent any apartment for less than 30 days. Was there any such requirement in effect that you know of by the Federal Housing Administration prior to 1952, as shown by these—

Mr. Long: Where are those exhibits?

Q. I will put it this way to you, Mr. Adickes:

Mr. Eardley: Here is the first one (handing).

Mr. Long: That doesn't have anything to do with it.

Mr. Eardley: Yes, it does too.

Q. Mr. Eardley says that this has something in it which says you shall not rent an apartment for less than 30 days.

Will you see if you can find anything in that that says that. That is a letter of August 10, 1951. He pointed his finger to the last paragraph on the second page.

Mr. Long: Wasn't it, Mr. Eardley?

Mr. Eardley: The last paragraph on the whole thing.

Q. Just read that out loud, Mr. Adickes. A. The next to the last paragraph of the letter dated
199 August 10, 1951, "In considering rent schedules and methods of operation proposed by mortgagors, Directors will bear in mind that the objective of this Administration is the production of housing designed for occupancy of a relatively permanent nature and that transient occupancy is contrary to policy. No approval will be granted with respect to a proposal anticipating transient occupancy."

Q. Do you interpret that as prohibiting the rental of an apartment for less than 30 days?

Mr. Eardley: I object, your Honor. That is calling for a conclusion of the witness. A. Yes.

Q. You would so interpret it, and that is dated December 1951? A. Yes.

Mr. Eardley: August.

Q. August. A. August 1951.

The Court: He has already answered it. I don't think it makes much difference how he interprets it.

Q. Is this the first notice that you recollect that the Federal Housing Administration received where it stated that you would have to put into the contract a stipulation that there should not be rented any apartment for
200 less than 30 days? A. That is the first one I remember.

Q. As far as you remember, that is the first time? A. As far as I know, that is the first.

Q. And that is the— A. February '52.

Q. February '52. Mr. Adickes, do you ever recollect— you have been the Chief Evaluator for the FHA, haven't you? A. Yes.

Q. What other positions have you held with FHA? A. Oh, almost—

Q. Every one? A. Almost every one.

Q. I know you were the mortgage credit man at one time. A. Yes.

Q. You were the Chief Evaluator, I believe? A. Yes.
Q. Chief Underwriter? A. Yes.
Q. Executive Administrator? A. Yes.
Q. Then the Director? A. Yes.
Q. And now you are the— A. Assistant Director.
201 Q. Assistant Director. At any time do you ever recollect, in any of the positions that you occupied, sitting in on any conference with the FHA prior to the receipt of this thing of February 1952, where they said to put that in there, that any sponsor was ever told he could not rent an apartment for 30 days or less? A. I do not remember.
Q. Thank you.
The Court: Mr. Adickes, let me ask you one question. A. Yes, sir.
The Court: Apparently the Administrator is given the authority to regulate certain of these mortgagors' operations, isn't that right? A. Yes, sir.
The Court: They regulate the rents? A. (nods yes).
The Court: What do you mean by methods of operation, if you know? A. That is the management's method of operation. I am not trying to be facetious, sir, but it would involve decisions that probably Mr. Steadman makes with respect to the operation of the Darlington, whether they advertise or don't advertise, or try to improve net income by reducing the rents to get greater
202 occupancy; any decisions affecting the operation of a housing project is my idea of methods of operation.
The Court: Well, if the Administrator always had the right to regulate the method of operation, then you don't need all of this stuff about this 30-day provision, do you? If the Administrator had the right to regulate the methods of operation of the mortgagor corporation, then the Administrator could come along and say "You can't rent to Walter Hoffman. You can't rent to Mr. Eardley. You can't rent to Mr. Higgins. Or you can't rent it for less than 30 days. You can't rent it for less than 6 months. You can't rent it for less than a year." Now, I know there is a 3-year provision. But would you consider "method of operation" to say that the Administrator could come forward and say, for example, that you couldn't rent any place for less than a year, any apartment? A. I believe

that if there were a default under the mortgage, the Commissioner could take over and naturally operate it.

The Court: Well, default under the mortgage is failure to pay, in that sense. What do you consider default
203 under the mortgage when you referred to that? There are other defaults under the mortgage too. A. Yes, sir, but generall I think that failure to make payments.

The Court: Failure to pay. Well, I am not interested in that. I know that if you don't pay, you stand the consequences. But I am trying to arrive at what was in the mind of the FHA when they refer to "methods of operation." They clearly have a right, the Commissioner has a right in that sense,—you have occupied the position of Commissioner in South Carolina to that extent. I mean, he operates through the State men. Now then, if you have always had the right to restrict these mortgagors on their methods of operation, it doesn't make any difference what edict comes out of Washington, isn't that true? A. I would think so, yes, sir.

The Court: Well, have you ever regarded that under your general power of regulating the method of operations that you had a right to tell a mortgagor corporation that they could or could not rent an apartment for a definite period of time? Now, I am forgetting all about what
204 has come out of Washington in written form, other than that authority under the act that you have. A. We have all along been encouraged to believe that the Commissioner as preferred stockholder could pretty well control the operation of a 608 project.

The Court: In other words, he can in effect do anything he wants to. A. (nods yes).

The Court: Well, if that is the case, why would the American Hotel Association get so concerned about this matter of renting transient rooms? If the Commissioner has always had the authority, all he had to do was to say, "I have always had the authority, now you go ahead and tell all of these mortgagors that they can't do it." A. Well, he did tell us to tell them they can't.

The Court: But he didn't tell you until after 1952? A. That is correct.

The Court: All right. Thank you.

Mr. Eardley: I want to call your attention to an inadvertent error. The first instruction about transient rentals came out in August 1951.

205 The Court: I beg your pardon, that's right. August 1951, in the letter from Clyde Powell, the last paragraph of the letter.

Mr. Long: That was transient rentals.

Redirect Examination

By Mr. Eardley:

Q. One more question: In answer to Mr. Long, you stated that you had never had any discussion. Did this question of transient rentals come up at any time until you were aware of the fact that the Darlington was renting to transients? A. I am extremely sorry, I didn't catch that. Will you repeat it.

Q. Did you ever have any problem of transient rentals to come to your attention in this area prior to the time you learned that the Darlington was renting to transients? A. Yes. I will say yes.

Q. And what project was involved? A. The Calhoun Towers at Greenville, I believe, but I am not too sure.

Q. And what did you do about it? A. I believe now we have their letter to the effect that they will not accept any tenants for less than 30 days.

Q. They have agreed to do it? A. Yes.

Q. Outside of that one instance, do you recall any

206 other instance where you have had this problem?

A. There have been others but just at this moment I don't remember in connection with what projects particularly.

Q. How many Section 608s are under your control? A. I don't know exactly, but I would say close to a hundred.

Q. That is all.

Recross Examination

By Mr. Long:

Q. And you have had other occasions where you all have tried to stop transient rentals? A. That's right.

Q. Do you remember when you wrote to Calhoun—what is this place in Greenville? A. Oh, Calhoun Towers?

Q. Yes. A. Yes, we wrote them.

Q. I mean, do you remember when you told them then that there was a new law that stopped them, the '54 act? Do you remember that? A. No. I think there was some trouble with the hotel association as a result of renting to some people during the textile exposition.

Q. The hotel association complained? A. Yes, I think the hotel association complained.

207 The Court: Mr. Adickes, when the FHA—I think Mr. Eardley has told me this in Norfolk, but I think I had better clear it up for you,—when the FHA is required to pay on one of these defaults, then of course the procedure is to foreclose the mortgage, is that correct? A. Yes, sir, usually, or a voluntary conveyance might be made.

The Court: Or a voluntary conveyance. If I understand correctly, if it is a voluntary conveyance, then—for instance in this case, the Darlington, Inc., would convey to Norman Mason, the Commissioner, is that the way it goes? A. I believe it would be the Federal Housing Commissioner, his successors and assigns.

The Court: Yes. Then the Commissioner would in turn sell that property, would he not? A. If he could get what he thought was a likely price he would sell it immediately.

The Court: Does the Commissioner have any authority to impose any restrictions on that sale? Do you know? If you know. A. Yes, if he takes back a mortgage. If somebody buys it outright, I don't think the Commissioner would have any further interest in it. But if he

208 took back the mortgage, he would control the operation.

The Court: So, in other words, if the property is foreclosed, then the title never goes to the Commissioner, although he has a right to bid it in at the foreclosure sale, isn't that correct? A. Generally, the Commissioner does acquire title by foreclosure.

Mr. Eardley: I am sorry. You are being misled a little bit. This is a subject with which I am quite familiar.

The Court: Well, if you could tell me the facts then, and we can agree to it, that will be fine.

Mr. Eardley: I can tell you briefly what the law provides. It provides that in the event of a default, the bank or the mortgagee has an election to either foreclose or to assign. If it assigns, it loses one point, one percent, in order to take care of the foreclosure expenses. If it is foreclosed by the bank, the bank is under an obligation to acquire the property and deed it over to FHA.

Mr. Long: And they can only deed it to the FHA.
209 The bank must get the title to it and deed it to the FHA.

The Court: Suppose they foreclose and I stepped in there and bid it up more than the debt, don't I have a right to—

Mr. Eardley: The bank is only going to protect itself. Once the purchaser goes above the loan, naturally they will let it go, because they are completely protected and they would rather have his money than the FHA debentures.

Mr. Long: I differ with the law on that, your Honor.

The Court: What I am driving at, in the Darlington, am I correct in this: That if there was a default in the Darlington, Inc., and I am speaking of a legal default that would justify a foreclosure, then the property could be put up and sold. Now, leaving aside the fact that I am a District Judge and perhaps disqualified from being a purchaser, but let's say that I am a very wealthy individual and I think it is a fine project. I go to the foreclosure sale and I bid it in for more than enough to pay off the FHA, which would be unusual because the FHA is probably in it right up to the hilt.

Now, I buy it in. Of course, I can operate it for
210 any purpose that is consistent with the laws of the zoning ordinance of the City of Charleston and the laws of the State of South Carolina, and so forth.

Mr. Eardley: Mr. Long doesn't believe that you could buy it in.

Mr. Long: Your Honor, I not only believe it, but the law says you can't. The law says that if the mortgagee forecloses, he has got to get the title and assign that title to the Commissioner before the contract of insurance is cancelled, and there is a special provision in the law that then lets the Commissioner sell the property without regard to any limitation of any laws.

The Court: Well, in other words, if I bought it then from Norman P. Mason, the Commissioner, he would convey to me free of strings if I pay cash. Now, of course, if he in turn is going to finance it again, then I have got to mortgage my soul away and sign everything to agree to do this, and let him run my business.

Mr. Long: Not only that, the law provides, your Honor, that he can sell it back to you.

Mr. Eardley: That is a legal question.

Mr. Long: Listen, your Honor: Not only that, but the law provides he can sell it back to you and
211 no regulations apply to the sale back to you. And I think Mr. Eardley agrees with that.

The Court: Well, I understand the picture, gentleman, and I just wanted to get that picture. I didn't want to have you gentlemen testify, but you volunteered the information, and I think I have got what I want out of the witness along that line. Have you finished with this gentleman?

Mr. Long: Just one question.

Q. Mr. Adickes, the officials in Washington directed your office, regardless of whatever confusion there was, to go forward and insure this loan? A. I believe that is correct.

The Court: Thank you very much.

Mr. Eardley: That concludes the government's case.

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212 JOHN W. FINLEY, SWORN

Direct Examination

By Mr. Long:

Q. Mr. Finley, to expedite matters, you are the manager of the Darlington Apartments and have been almost since it was opened, is that right? A. Since the first day it opened, yes, sir.

Q. Please state whether or not there has always been a type of receipt that has been given to monthly tenants and to the daily tenants as and when they started coming in the building? A. As they pay the rent.

Q. What is that? A. As they pay the rent, yes, sir.

Q. As they pay their rent. Is this the type of receipt (indicating) that has been given to them? A. That is the original receipt. I brought that back from Atlanta as a copy. We changed the setup here due to the fact that Atlanta didn't have furnished apartments at that time.

Q. And you all put the furnished apartments up there? A. We put the furniture in, that's right. They didn't have a switchboard there either, Mr. Long, and we
213 had to add the telephone to it.

Cross Examination

By Mr. Eardley:

Q. When was this receipt first used, the one that I am now showing you, which is Plaintiff's Exhibit 42? A. This here receipt with all of this wording on it?

Q. Yes. A. Well, this receipt was used to the best of my knowledge for the first rent receipt that was written in the Darlington Apartments, the first rental.

Q. With all of the same wording? A. That's right. All except this, we just put this here on (indicating).

Q. "Have you left your key?" A. That's right.

Q. And you also broke it down by furniture rental? A. Furniture rental.

Q. When you rent an apartment to somebody for $6 for a night's lodging— A. That's right,

Q. —does your receipt always show a breakdown between the rental for the apartment and the rental for the furniture? A. Not on a transient rent receipt, no, sir.

Q. The transient rent receipt only shows $6? A. That's right, and it is broken down before it is sent
214 to the bookkeeping department.

Q. So, as far as the customer is concerned, all he knows is that he gets a receipt for $6? A. That's right.

Q. This is then sent to your bookkeeping department and they take the $6 and they break it down themselves? A. My bookkeeper breaks it down before he sends it to the accounting department.

Q. And has that been the practice consistently? A. Consistently, yes, sir.

Q. Thank you very much.

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239 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTHERN CAROLINA

CHARLESTON DIVISION

C/A 4741

THE DARLINGTON, INC., *Plaintiff*,

vs.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Transcript of Proceedings and Testimony of June 14, 1956

A hearing was held in this matter on the 14th day of June 1956, in the United States Courtroom at Norfolk, Virginia, with

HONORABLE WALTER E. HOFFMAN, United States District Judge, *Presiding*.

APPEARANCES:

H. H. HIGGINS, JR., ESQ., *For Plaintiff*.

CARL EARDLEY, ESQ., Special Attorney, Department of Justice, *For Defendant*.

The Court: Gentlemen, in this Darlington against Federal Housing Administration, the purpose of this hearing, if I recall, is to permit Mr. Prothro to be
240 cross-examined on the affidavit that was filed by Mr. Eardley at the time of the hearing last September at Charleston.

Mr. Eardley: Correct. Mr. Prothro is present.

The Court: I assume the procedure would be for him to be sworn and let Mr. Higgins start cross-examination.

Mr. Eardley: I would just like to ask him whether or not the statements made in here are true.

ADOLPHUS M. PROTHRO, SWORN

Direct Examination

By Mr. Eardley:

Q. Mr. Prothro, you are the Director of the Legal Division of the FHA, are you not. A. Yes, sir.

Q. In such capacity did you make this affidavit which is Defendant's Exhibit 6? A. Yes, sir.

Q. Are the statements contained therein true to the best of your information and belief? A. Yes, sir.

Cross-Examination

By Mr. Higgins:

Q. Mr. Prothro, I note you have been with the Federal Housing Administration since 1934 and at the time of making this affidavit you were Acting General Counsel for the Federal Housing Administration. A. That is correct, sir.

241 Q. What is your present position with the FHA? A. Director of the Legal Division, sir.

Q. Now, do you recall when the Title VI, section 608 program was initiated? A. Yes, sir, approximately; not within a matter of days but within a matter of months I can tell you.

Q. When was that? A. That was in 1942, I believe.

Q. During the war? A. Yes. I might explain, sir, if I may, that I was away in military service during that particular period.

Q. When did you return to your employment? A. I returned in 1945, sir.

Q. And wasn't it after the war, in '45 or '46, that the Federal Housing Administration you might say pepped up that program? A. Yes, sir, I would say that is correct.

Q. Were you with FHA at that time? A. Yes, sir.

Q. In your affidavit you state that it is the duty of the Legal Division to interpret the Act and that the Federal Housing Administration has interpreted the language "principally designed for residential use" to mean or to:

"(a) Allow the insurance of residences in which
242 such professional people as doctors, dentists, chiropractors, etc. might establish an office, and

"(b) Allow the insurance of multifamily housing projects in which commercial facilities catering to the needs of resident families were allocated."

And in paragraph 3 you state that the Federal Housing Administration has never interpreted the word

"principally" to permit the use of a portion of the dwellings for transient accommodations; is that correct? A. Yes, sir.

Q. When were you informed of that policy or that interpretation, Mr. Prothro? A. I would say that I became aware of it during over a long period of time beginning in 1945 through reading releases that had been put out during my absence in military service and through participating in releases that went out after that time.

Q. I was going on to ask you in what form you had received that interpretation. You say releases? A. Basically they were letters, sir, to our field offices explaining to them what the policy of the Administration was with respect to transient occupancy.

Q. Do you happen to have any of those with you, Mr. Prothro? A. There are some in my briefcase that have a bearing on it, sir.

243 Q. Would you be good enough to show them to us or read some of them to us? If it is convenient, Mr. Prothro, I would like for you to take them in chronological order beginning with the first one bearing on this question of interpretation. A. All right, sir. I believe that the earliest one that I have here is August 10, 1951. This doesn't mean that there weren't some earlier ones that I have seen but I do not have with me all of the releases that went out on this general subject.

Q. Would you read that one, please. A. This is letter to all Directors of all Field Offices of FHA.

. . . . . .

244 The Witness: May I say, sir, I have one here of June 21, '49, that I didn't realize.

Q. (By Mr. Higgins) May I have a look at that one? A. Yes.

245 Q. Mr. Prothro, I believe the part of this you feel is pertinent, the part that states: "Projects primarily intended for transient or seasonal occupancy such as hotels, apartment hotels, resort accommodations, or purely residential apartments where it is necesary to obtain high rentals during the tourist season in order to carry the apartments during off season will not be eligible." Is that what you had in mind? A. I

don't believe the letter says anything about eligibility there, sir. If I may tell you that what I think is pertinent here.

Q. Please do. A. Sections 207 and 608 of the National Housing Act refer to residences and dwellings and we have always considered these terms to have reference to dwelling accommodations intended for occupancy by families for extended tenure.

Q. However, that does not exclude the use of a portion of the accommodations of a project for transient use? A. I wouldn't say this letter is germane to that.

Q. Wasn't that written to solve the Florida problem more than anything else? A. No, sir, it was a general problem. It still is a general problem, sir.

Q. Pretty much around the country? A. Yes, sir.

Q. At any rate now, you became informed of this policy or interpretation of policy through various directives
246 of this sort. When was the first directive issued by the Federal Houisng Administration to the effect that any rental for a term of less than thirty days was prohibited? A. I can't answer that, sir.

Mr. Higgins: I think the defendant has submitted a couple of exhibits in that respect. Mr. Eardley can correct me. I believe the first one was in January 1950.

Mr. Eardley: The preceding August.

Mr. Higgins: Of what year? August of '51 and then another one.

Mr. Eardley: We are talking about the same thing.

Q. (By Mr. Higgins) August of 1951 and there was another one in January, I believe, of 1952; January or February.

Mr. Eardley: The years I don't know about but the months I remember.

Q. (Continuing) Was this policy communicated to the public at large, Mr. Prothro? A. May I ask what policy you mean, sir?

Q. The policy prohibiting transient rentals.

Mr. Eardley: Your Honor—

A. Yes, sir, I would say so.

Mr. Eardley: We submit that the statute itself
247 was the communication to the public and those people who participated in its benefits.

Mr. Higgins: Your Honor, the statute makes no mention of that.

The Court: I think what Mr. Higgins has in mind, Mr. Eardley, is prior to the passage of the 1954 Act. You didn't mean after that, did you?

Mr. Higgins: No, sir, I mean prior to the 1954. I will rephrase the question.

Q. Prior to the enactment of the 1954 Housing Act in what manner had this policy, the policy prohibiting rentals for terms of less than thirty days, been communicated to either the public at large or to the sponsors, builders and operators of 608 projects and the participating lending institutions? A. By provision, sir, in the corporate charter which FHA either prescribed or approved in each instance.

Q. Which charter provision was that? A. One charter provision restricted the purpose of the corporate activity to the operation of a housing project or projects and the word "housing" was construed and believed to be imparted, at least by those of us who worked on it. I am getting into matters of opinion.

Mr. Higgins: That would be a matter of judicial interpretation. Our charter is in evidence and we have both argued our view on that I believe.

248 Q. Back in 1945 or '46, when the FHA undertook to promote the 608 program hard, did you tell those builders, "Now, you can't rent any apartment in this building for less than thirty days"? A. Sir, I don't think I can accept the question. I am not so sure that FHA ever promoted the 608 program.

Q. Would you deny that FHA had promoted it? A. I can't deny it.

Mr. Eardley: May I object to this. Mr. Prothro is a lawyer who was brought down here for the sole purpose of interpreting what the words "principally designed" meant. Now he is being asked what builders were told.

The Court: The Court will take judicial notice of the fact Mr. Prothro never contacted all the various sponsors and builders of these projects.

Mr. Higgins: Your Honor, my only purpose in asking these questions, we are concerned with the interpretation, FHA's interpretation of policy, FHA's interpretation of

the Act in fact, and the activities that the Federal Housing Administration engaged in in implementing that Act I think could be considered in arriving at their interpretation of policy.

249 The Court: Let me ask Mr. Prothro a question.

By the Court:

Q. Mr. Prothro, I believe I have read where former President Herbert Hoover lives in the Waldorf Astoria Hotel in New York, that he is a permanent resident there. I may be wrong in that but whether I use former President Hoover or whether I use John Jones makes no difference. Suppose that the Waldorf Astoria Hotel rented 50 rooms in that hotel to people who reside there for periods of longer than 30 days at a time, would you say that that changed the character of the Waldorf Astoria and made it an apartment house? A. That 50 out of a large number, I assume the Waldorf has a very large number.

Q. Let's say 50 out of 500 rooms. Say 10 per cent, or 15 per cent. A. I think it could, sir. It would be a matter of degree. I don't know just where we would stop there. But I think that it could become an apartment hotel after a time, or a combination of two as distinguished from a pure commercial enterprise.

By Mr. Higgins:

Q. Mr. Prothro, as a matter of fact the Federal Housing Administration had never attempted to prohibit so-called transient rentals until they had received complaints from the American Hotel Association, had they?

250 Mr. Eardley: Object to that as being immaterial.

The Court: It may be material. I will permit it if he can answer it. I don't know that he can answer the question.

A. I don't know the answer, sir. That type of thing wouldn't come to my attention. Basically that would be the policymakers more than the lawyers.

Q. You were acting General Counsel sometime ago? A. For a few months; between the term of one general counsel and another general counsel.

Q. In 1945 and '46 what were you? A. I was merely a

lawyer on the staff for a large part of that period until I guess about 1948 I was made Assistant General Counsel.

Q. What was your position in 1952 and '53? A. Assistant General Counsel, sir.

Q. Had any members of the American Hotel Association approached you personally? A. Personally, no, sir.

Q. You never had any conversation with any of them? A. No, sir.

Q. Do you know Mr. Arthur J. Packard? A. No, sir. He may be one that I have heard testify before committees of Congress but if I have known him it is just because I saw him testifying there. I never met him
251 personally, sir.

Q. Mr. Prothro, before the enactment of the 1954 Housing Act, the Federal Housing Administration had not actually prohibited any 608 to rent any units for less than 30 days, had it? A. They had attempted to, sir.

Mr. Eardley: The letters speak for themselves. The evidence is before you. Letters 210 and 214 are express prohibitions of transient rentals and they were long before the Housing Act of '54.

The Court: I think those letters are in evidence.

Mr. Higgins: They are. But might I point out to your Honor that those letters deal with the eligibility for future commitments, future mortgages to be insured. They make no mention of those which have already been insured.

Mr. Eardley: They purport to establish a policy.

Mr. Higgins: They say "shall not be eligible." I will go along with that then.

Q. In 1954, after the enactment of the 1954 Housing Act, you required an agreement or certificate from a prospective mortgagor that he would not rent any units for less than 30 days, did you not? A. Yes, sir.

252 Q. As a matter of fact you had required that before the enactment of the new Housing Act, hadn't you? In the case of the new mortgage, new commitment? A. I want to check my records, sir. I am not quite sure at the moment.

Q. But until the 1954 Housing Act was passed you had done nothing to stop an existing 608 from renting for less than 30 days, had you? A. That is not correct, sir. No, sir; that isn't correct.

Q. Had you or not? A. We had. We had made efforts.

Q. Those efforts, what were those efforts? A. Some of those efforts took the form of litigation reports to the Department of Justice with a request for suit.

Q. What would be the nature of those suits? A. To restrain the corporate charter violation of the corporations who had agreed to rent housing Act accommodations.

Q. Under the particular corporate charter involved? A. Yes, sir.

Q. Under State law or federal? A. Under the provisions of the State law, sir.

Q. Were any suits actually brought? A. I don't know, sir.

Q. You do not know? A. I do not know.

253 Q. For the most part didn't you try to enforce that interpretation of policy when a mortgagor would come in and want to renegotiate or when he would want an increase in commitment, or when he would ask for furniture rental schedule? A. I would say for the most part that is true.

Q. In other words, you had to depend upon his voluntarily complying with your wishes in that respect? A. I wouldn't say that, sir.

Mr. Eardley: That is calling for a legal conclusion, your Honor.

Mr. Higgins: I will restate it so that it won't.

Mr. Eardley: It is also improper cross-examination; far beyond the scope of what this witness was called on to testify about.

The Court: I agree with you. However, of course this gentleman is a lawyer and no doubt a very capable one and is fully aware of the policies. It is true that the only reason he came down here was to confine his testimony to the construction of the term "principally designed for residential purposes."

Now, I don't know whether you are trying to open a new field there, Mr. Higgins.

Mr. Higgins: Not intentionally, your Honor.

254 Perhaps my view of the particular question is a little broad. Now, this affidavit is Mr. Prothro's opinion as far as I can see. In it he states what he thinks FHA's policy was. Now, I am cross-examining him on

these matters to bring out facts which might indicate that FHA's policy may not be exactly as he states it was.

The Court: All right. You may proceed.

Q. (By Mr. Higgins) My last question I believe was you had no means of enforcing this policy other than by a voluntary cooperation of the mortgagor?

Mr. Eardley: Again, I object on the ground that it calls for a legal conclusion. There are many means of enforcing a statute. You can get an injunction.

The Court: I think that objection will have to be sustained. You could ask him whether or not there were any other means resorted to, which I think you have already asked him, and he indicated that reports had been filed with the Department of Justice but that he had no information whether any suits were brought.

Q. (By Mr. Higgins) Now, in line with your affidavit here, this is in evidence, before the Senate Banking and Currency Committee which was considering the pro-
255 posed 1954 Housing Act, Arthur J. Packard, Chairman of the Board of the American Hotel Association, stated: "Officials of the Federal Housing Administration have generally been quite sympathetic. Section 1743 (b) (1), in connection with Section 608 properties, gave the Administrator authority for regulating rents, charges, and operations. But counsel for FHA has viewed narrowly this authorization. He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved. At the outset, the agency always required approval of all rent schedules. And these were normally expressed in monthly rentals. Counsel for FHA now takes the position that if one of these apartment buildings rents a room overnight for not over the one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting transient rental."

Do you know whether or not that was the view of the Federal Housing Administration? A. I think Mr. Packard's statement has a lot of inaccuracies in it, sir.

The Court: Who would have been the one in FHA to refute Mr. Packard's statement, Mr. Prothro?

Mr. Eardley: Your Honor, I would like to interpose an observation here. It is true that your Honor has the

right, of course, to take judicial notice of the records
256 which are made before the Senate. But that doesn't defeat the right of counsel to cross-examine. In other words, you wouldn't have the right to assume that Mr. Packard's statement was accurate because I have not had the opportunity to cross-examine Mr. Packard. He has not been a witness in this case. There isn't any testimony before your Honor supporting his statements.

The Court: That may be true, but it stands unrefuted up until now.

Mr. Eardley: My point is that there is nothing to refute. The mere fact that this man testified before the Senate Committee isn't binding on the Government in this case. I mean I can't believe your Honor would have a right to make a finding of fact based upon Mr. Packard's testimony.

Mr. Higgins: I don't contend that your Honor has that right. I asked Mr. Prothro if the statement was correct. That is all.

Mr. Eardley: He said it was not.

Mr. Higgins: He said it had some inaccuracies in it.

The Court: He said he was of the opinion it was a little bit inaccurate.

Q. (By Mr. Higgins) Do you happen to know
257 what the opinion of the General Counsel for FHA was at that time? I shouldn't ask that question. Let me restate that. A. Not too sure, sir, but while I was Acting General Counsel at that time.

Q. I was going to ask you if you were. A. I was not called on this hearing.

Q. You have never testified before this committee? A. Not in connection with this matter, no, sir.

Mr. Eardley: If your Honor wants, before we close I can clarify this and I want to do it because I don't want the Court to be misled. This case is going to be, as you know, a test case and I don't want any facts hidden from the Court. I don't want any facts that are important to the case not disclosed and this I believe, the testimony that he is leading up to, should be before the Court, but I don't think he is going to get there because he doesn't really know what the facts are. We discussed it on the plane coming down. I will bring it out for you so that the Court will have the full information as to what Mr.

Packard was talking about at the time he made the statement.

Mr. Higgins: In that case I will pass on. Thank you.

258 Q. In connection with your interpretation here that the Act prohibits any transient rentals, even prior to the '54 amendment, is it or is it not a fact that the Federal Housing Administration office in Washington assisted a 608 owner in having his apartment house designated a hotel to comply with the District zoning law? A. I will answer that this way: My affidavit does not say that the statute prohibited transient rentals.

Q. I beg your pardon. I don't mean to mislead you there. Your affidavit states that in your opinion the Federal Housing Administration's interpretation was such? A. No, sir, it doesn't say that. I am talking about the definition of a particular clause or phrase in the statute.

Q. "Principally designed for residential use." You state the Federal Housing Administration has never interpreted the word "principally" in the aforesaid language to permit the use. Isn't that about the same thing? A. No, sir; I don't think so.

Q. Well, now, had the Federal Housing Administration ever interpreted the words "principally designed for residential use," or any other words in the statute, to prohibit any occupancy in any FHA insured project for terms of less than 30 days? A. Yes, sir, without FHA approval. With FHA approval we felt they had the right to do so.

259 Q. Has FHA actually approved any transient rentals? A. Yes, sir.

Q. Had it prior to the Act of 1954? A. Yes, sir.

Q. And upon what basis? A. On the basis of the broad discretionary authority granted to the Federal Housing Commissioner to regulate methods of operation of these corporations. And on the basis that in some instances brought to our attention it appeared to be in the public interest, in the interest of the Government's financial interests, and in the interest of the community in which the structure existed in which there was no demand for apartment rentals, and we felt that authority existed in the Commissioner to weigh the charter provisions or to make exceptions where it was in the public interests.

Q. So in the past you have done that in some instances where there was not sufficient demand for permanent occupancy? A. Yes, sir.

Q. And where it was necessary for the operation to survive to accept transient tenants? A. Yes, sir; where we made a determination where it was in the public interest for any reason.

Q. And in the Government interest, by that you mean to increase the probability or possibility of the mortgagor's paying his payments under the mortgage and protecting the contract insurance? A. That had a bearing, yes, sir.

260

Q. Tell me again, I am not clear on it, what steps you took—by you, I mean the Federal Housing Administration—before the enactment of the 1954 Act to stop the 608's in existence from accepting transient rentals. A. Usually it would be in the nature of a cease and desist order or a request to refrain from this practice.

Q. Would that be a court order? A. No. It would usually be a request on our part to the operator. After all, these people were not dealing—

Q. In the event they refused to recognize that request what did you do then? A. First we would use what administrative sanctions we had. We usually had them requesting us for certain things and we would say, "When you carry out the objectives of the Act as we understand them to be, then we would be more inclined to favor your request."

Q. In other words, you give us what we want or we won't give you? A. You operate in accordance with the statute and we will give you what you want.

Q. If that failed what would you do, or what have you done? A. The only other recourse we had was to restrain charter violations.

261

Q. You stated, I believe, you didn't actually know if any restraining orders had been issued? A. I don't know whether there were actually suits brought by the Department of Justice.

Q. You don't know whether there was a judicial determination? A. I believe there was no judicial determination, sir, but I wouldn't be positive.

Q. Now, as an example, if one already in existence failed to cooperate with you in that respect and then he came

up with a new mortgage, you would insert the provision protecting you in that respect in the new mortgage? A. I don't know that that was ever done, sir, for sure. I don't know whether it was or not.

Q. You don't know that it was done in the case of Waluhaje down in Atlanta? A. I don't know, sir.

Q. You don't know whether it was done in the case of Savannah Apartments in connection with the Chatham? A. No, sir.

Q. Are you familiar with the correspondence in this case which you might say initiated the suit, the letters between the sponsor, the Darlington, and the State Director in Columbia and Mr. Pures, who was I believe Assist-
262 ant General Counsel at the time? A. No, sir.

Q. You are not familiar with that? A. Very vaguely acquainted with the facts in this case at all. Could I explain that, Mr. Higgins? I mean as Director of the Legal Division, naturally I have some familiarity with all of the cases but this would be assigned to one of my staff members.

Q. I wanted to ask you a question about one of the letters. Since you are not familiar with it I don't think you can answer.

Redirect Examination

By Mr. Eardley:

Q. You stated that apparently you first became familiar with this language and were concerned with "principally designed" in 1945 and '46? A. Yes, sir.

Q. The language was adopted, was it not, from the earlier statutes, the 203 and the 207 programs? A. Yes, sir. I would say it has been in all of our statutes, at least since the very early.

Q. Is this language also used in the statutes which were passed in connection with programs initiated in the Housing Act of 1954? A. Yes, sir. In what we call our Section 220 and 221 program which were enacted in 1954.
263 At the same time this hotel prohibition was enacted, that language was still carried; and is being carried in legislation which we are drafting now for Congress.

Q. What is the purpose of carrying this language. A. The primary purpose is to avoid those questions which

might come up if we said only residential use. There would be a question about whether if there is going to be a doctor's office in the building, whether we could properly insure that mortgage, or if there is going to be a parking lot facility in connection with it, whether we could properly insure that mortgage. In the small home field like a single family home where we use that same language, we are not even thinking about hotels of course; we are thinking about such things as maybe some outbuildings in a suburban area where a person might park his plumber's truck, or he might keep some pet rabbits that he is raising, or something of that sort, and sell the rabbits. Then there is a combination there, to be a slight combination of commercial with residential. Now, we feel that when we value those properties that we need some language like this in the statute to protect us against criticism later on or against actual violation of the statute. The only exception being the Title VIII program, which is the military program, we carry only the word "residential" use there; not "principally for residential use" because that housing is built on a military base
264 where Congress clearly did not want us to insure any commercial facility—no store, no dentist office or anything of that sort.

Q. These corporate charters that you mentioned which provided that there should be no other activity except that of housing, are they the same or is it taken from a standard form which is issued to all Section 608?

Mr. Higgins: Your Honor, I object to that. I don't think it is pertinent. We are only concerned with one charter here and it is in evidence.

The Court: I don't think there is any question that we are only concerned with one charter on it, Mr. Eardley. What would be the purpose?

Mr. Eardley: He testified generally about these cases you know and about the corporate charters, and I merely wanted to bring out they are all alike.

The Court: I think that is in evidence already.

Mr. Higgins: We will admit that anyhow.

The Court: All of the corporate charters prior to the passage of the 1954 Act were substantially the same except, of course, as they were changed to comply with the various State laws.

Mr. Eardley: That is right. If that is in the record, that is all I want.

265 Q. You made mention of the fact that there had been exceptions in connection with transient rentals. Approximately how many of the 608 projects were there? A. There were approximately 7,000, I would say.

Q. Approximately how many exceptions were made upon application by the mortgagor? A. Approximately 12 or 15.

Q. And did these exceptions come about through the application to FHA? A. Yes, sir. Naturally, the only ones we ever approved were those who applied to us for that approval and gave us justification for it.

Q. Did FHA designate the rentals which would be used and prescribe the terms which would have to be complied with if an exception were made? A. Yes, sir.

The Court: You approved a separate schedule for furnished apartments?

The Witness: Yes, sir.

The Court: For these so-called transient facilities?

The Witness: Such as we do for commercial facilities.

Mr. Eardley: It is important because you recall,

266 your Honor, in the 1954 statute there is an exception made for those who have written permission.

The Court: That is correct, and also seasonal.

Mr. Eardley: And it is these few who have written permission and I am trying to give you the history of how they came about.

Q. As I understand your testimony, FHA at one time at least took the position that the Commissioner since he was authorized to regulate the method of operation of the apartments could waive the charter provision and permit on such terms as he prescribed a transient operation; is that correct? A. That is correct. That was the official position taken.

By the Court:

Q. Mr. Prothro, on that subject, right after the passage of the 1954 Act, you gentlemen amended your rules and regulations and issued a bulletin, and, of course, the 608 projects had then gone out of existence. But Section 207 was, I believe, a forerunner and a more or less successor, was it not, to 608? A. Yes, sir. It would

be the permanent long-range program. The 608 was a temporary.

Q. I have some recollection in those rules and regulations that you put out shortly after the passage of the 1954 Act that you there defined methods of operation? A. In more detail, yes, sir.

Q. Then in a succeeding section, right after
267 "Methods of Operation," I believe you had some provision in there which was entitled "Special Conditions." I am speaking only from memory; I don't have the exhibit before me and the exhibits are so voluminous it would take hours to look through it. And under those "Special Conditions" you there provided the restriction against renting to transients and required a provision in the charter to the effect that you could not rent to anyone for periods less than 30 days; that is correct, is it not? A. Yes, sir.

Q. Well, now, why would it have to be inserted as a special condition if it was in fact a method of operation that FHA could regulate prior to that time? A. I don't think it would have had to be, your Honor. I feel that in drafting a set of regulations—it is usually done as a midnight operation; they expect the regulations to be out in a few minutes after the statute is passed—and each of our regulations is broken down with a little title or heading of some sort; and that quite often is done by a clerk in the office who says, "Let's call this special conditions. Let's call this one something else. Let's call this one something else." And it is for convenience in the use, the public using the codification that we publish in the Federal Register. I must admit that some of those breakdowns and
268 headings bear no resemblance to what a capable lawyer could do with it if he spent a few days on it instead of a few minutes. That is the best explanation I can give you, why that is broken down that way, sir.

Q. I noticed in reading that exhibit on the rules and regulations promulgated following the enactment of the 1954 Housing Act that the methods of operation as defined therein to be methods of operation were substantially the same as the so-called special provisions put into the charter of each of these sponsoring organizations. Do you recall whether that is correct? A. Yes, sir, I think that is correct. There were some minor changes but basically I think that is correct.

The Court: Mr. Eardley, bring out this Arthur J. Packard a little bit more from Mr. Prothro.

Mr. Eardley: That is what I was trying to do.

By Mr. Eardley:

Q. After the passage of the 1954 Act was there a change in the opinion of the FHA as to whether under the term "methods of operation" they could in their discretion upon application permit transient rentals? A. There was a definite change in our interpretation of the intent of Congress from that time forward because we now felt that there was no discretionary authority in FHA to approve transient rentals.

269 Q. Under methods of operation? A. That is correct.

Q. At the time, however, that Mr. Packard was testifying, as I gather your testimony, it was the opinion of FHA that it had discretion upon application to permit transient rentals? A. Yes, sir. I would like to note what date that was.

The Court: It was in March of 1954, the hearing was.

Mr. Eardley: Preceded the '54 statute.

The Court: Yes. It was in March 1954.

Mr. Higgins: They were heard, I believe, during several weeks in March and April.

Q. (By Mr. Eardley) Do you recall who was the General Counsel at that time? A. In March of '54, Mr. Bolvard, B. C. Bolvard was still the General Counsel. He left the Administration about April 13th, '54.

Q. Was it during his administration that these deviations were permitted? A. What do you mean by "deviations"?

Q. I mean the allowance of transient rentals in these 12 to 15 cases that you have mentioned. A. I would say it was during his tenure as General Counsel or prior thereto. He had been General Counsel for several years. It was undoubtedly during his tenure.

270 Q. Then it is correct, is it not, that Mr. Packard in referring to the General Counsel's views was referring to Mr. Bolvard? A. I think that is correct, sir.

Mr. Eardley: Is there anything further you would like to bring out on that, your Honor? That was the policy.

The Court: No.

Mr. Eardley: Then I am sure that is what Mr. Packard must have been talking about.

Recross-Examination

By Mr. Higgins:

Q. I didn't mean to get us so far off there. But, back to your affidavit, you state that FHA has never interpreted these words in the Act to permit transient rentals. Your idea is that you had discretionary power under the right to regulate methods of operation? A. Yes, sir; that discretionary power plus a very broad grant of authority in Section 1 of the National Housing Act which gives the Federal Housing Commissioner extremely broad authority in the administration of the housing program.

Q. You mentioned you first ran across these words "principally designed for residential use" back in 1945 and '46 in connection with the single family dwelling programs. I believe they were both? A. They were in
271 the statute much before that, sir. I would say—

Q. Yes. As far back as they go. When they first appeared in the statute the National Housing Act didn't provide for anything but dwelling houses, did it? There were no 608 apartment projects? A. When it first appeared in the Act there were certainly no 608 projects, I agree with that.

Q. In other words, the 608 program is entirely different from the 203 or 207 program? A. It is a separate program, yes, sir.

Q. In other words, the houses that would be built under 203 or 207 by the very nature would not be suitable for transient use? A. That isn't correct, sir.

Q. What are they? What kind of houses could you build under 203 and 207? A. The 207, sir, was almost identical with the 608 program with one exception: 207 permitted an 80 per cent mortgage to be insured; 608 permitted a 90 per cent mortgage.

Q. When was 207 first enacted? A. In 1934. But it was a multifamily housing program of the same type magnitude and scope of the 608 except it never got successful because only an 80 per cent mortgage was insured by FHA.

Q. There never were any elevated apartment
272 houses built under that? A. Yes, sir.

Q. Under 207? A. Yes, sir.

The Court: Wasn't quite as much chance for the good old windfall profits under 207 projects?

The Witness: No, sir. There wasn't because there was a lower ratio of loan value. It was an 80 per cent mortgage instead of a 90 per cent mortgage.

Q. (By Mr. Higgins) You stated when those were enacted you weren't thinking of hotels. The truth of the matter, you didn't think of the hotel question until around 1952? A. We always thought about housing—I mean as long as it was housing. We always felt in FHA housing is permanent occupants.

Q. That is right. A. Reasonably permanent.

Q. It didn't occur to you to prohibit transient occupants because you hadn't thought there would be a transient occupancy. You had not anticipated the problem? A. We thought by putting housing in the statute we would avoid any problem of that nature—in the charter. We had two provisions in the charter that referred to housing.

By the Court:

273 Q. Mr. Prothro, the Act requires a preference to veterans, 608, as I recall? A. Yes, sir.

Q. Now, suppose a veteran went to one of these projects and said, "I am going to be here three weeks." And the project owner states: "Sorry, we can't rent to you." Now, would the veteran be deprived of his rights given to him by Congress? A. I believe he would under those circumstances, yes, sir. I mean I don't believe that was really a right that Congress intended for him to have. He might have said, "I want to stay here for three hours or three days," but that wasn't what I think Congress had in mind. He was thinking of homes for veterans who were returning from the war, people who were living in chicken coops and with their in-laws when they got back from military service.

By Mr. Higgins:

Q. You are speaking of methods of operation, you said that in some of the other sections or some of the other titles, methods of operation had been spelled out in more detail. As a matter of fact it is pretty well spelled out in Section 207, isn't it? A. That is matter of opinion, sir, as to how well they are spelled out.

Q. There is a section under 207 defining methods of operation, I will put it like that? A. You mean the

274 current regulations? I believe in the old regulations—

Q. I am asking about the old regulations. A. I believe in the old regulations you will find that 608 and 207 were about the same in every particular except 90 per cent.

Q. With the exception that under 608 methods of operation were not defined and under 207 it was defined? A. I wouldn't say, sir. I am not sure on that point but I don't believe that is accurate.

Q. At any rate, you don't know? A. I don't know right now.

Q. Prior to the passage of the 1954 Act, was there any place in the Act itself or in the Commissioner's regulations, corporate charters or the mortgage, expressly prohibiting a 608 mortgagor from renting units of less than 30 days?

Mr. Eardley: Your Honor, that calls for a legal conclusion here.

The Court: I think that you have conceded that.

Mr. Eardley: This is argument.

The Court: I understood Mr. Eardley had conceded that there was no express spelling out.

Mr. Eardley: There was no language that said, "You cannot rent to transients," if that is what you mean.

275 I think the history of the Act makes it just as expressly clear.

Mr. Higgins: I will withdraw.

I have nothing further. Thank you.

Mr. Eardley: That is all.

(File endorsement omitted)

276 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

THE DARLINGTON, INC., *Plaintiff*,

v.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Opinion—June 20, 1956

This is an action by way of declaratory judgment instituted by plaintiff (hereinafter called Darlington) against

defendant (hereinafter referred to as F. H. A.) seeking a declaration of Darlington's rights to lease certain apartments in a multifamily apartment building owned by it for periods of less than thirty (30) days. The defendant, acting by and through Norman P. Mason, Commissioner of Federal Housing Administration, requests dismissal of the action and affirmative relief by way of an injunction requiring Darlington to cease and desist in such practices. No issue is raised as to the failure to name the Commissioner as an original defendant; the Commissioner having waived this point in his pleadings. Defendant's motion to dismiss under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., was converted into a motion for summary judgment under Rule 56, thus enabling the Court to consider evidence presented by both parties and dispose of the entire controversy.

Darlington is a corporation organized and existing under the laws of South Carolina with its charter conforming in all respects to the requirements of F. H. A., the insurer of the mortgage placed upon this modern, completely air conditioned, twelve-story multifamily apartment building erected by Darlington in the City of Charleston, South Carolina. Plaintiff urges that the practices engaged in by F. H. A. promoting the construction of these apartment buildings financed under Title VI § 608 of the National Housing Act,[1] as amended, should be considered by
277 the Court in determining the equities involved, but there is no merit to this contention as the evidence discloses that the first application submitted was withdrawn due to the objection of certain F. H. A. officials as to the location of the project. Thereafter, a subsequent application was approved upon the insistence of Darlington's sponsors. That an error of judgment was made in the selection of a suitable location is rather obvious under the circumstances, but this affords no reason to penalize the defendant.

This is not a matter involving so-called windfall profits which became so prevalent under loose and questionable practices in the years following the termination of World War II. Plaintiff's sponsors caused land, valued at

[1] National Housing Act, approved June 27, 1934, 48 Stat. 1246, as amended by addition of § 608, May 26, 1942; 56 Stat. 303, and as thereafter amended; 12 U.S.C.A. 1701, 1743.

$125,000.00, to become a part of the project. It has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11. F. H. A. insured a mortgage to the extent of $1,357,700.00, thus leaving an investment of $318,220.11 on the part of plaintiff. While it is improbable that this represents a total cash outlay by plaintiff, it is nevertheless conceded that the amount of the mortgage is approximately 90% of the total cost of the building and well within the legitimate financing of "608 projects".

During the latter part of 1949 the "608" application was approved and, on December 7, 1949, a charter was granted to plaintiff by the Secretary of State of South Carolina. As heretofore noted, the charter was in accordance with a form prescribed by F. H. A. and contains, among other features, certain pertinent provisions as follows:

> ". . . So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner *it shall engage in no business other than the construction and operation of a rental housing project or projects.* . . .
>
> "(e) In the event of any default by the corporation, as hereinafter defined, and during the period of such default, the holders of the Preferred Stock (F. H. A.), voting as a class, shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead; provided, however, that one of said directors shall be the owner or holder of one or more shares of common stock. When such default or defaults shall have been cured, the right to
> 278 elect directors shall again vest in the holders of the common stock. . . .
>
> "SEVENTH: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after commencement, any receivership, bankruptcy or other form of liquidation instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by the terms of such instruments; (3) the failure of the corporation to estab-

lish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) *the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties,* or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated.

"(b). In the event the mortgagor is in default under the terms of this certificate of incorporation or has failed to perform the covenants required by it to be performed under the terms of this certificate or by any mortgage insured by the Commissioner, the Commissioner may require the corporation to furnish at the expense of the corporation a complete audit of its books of account duly certified by a certified public accountant. . . .

"Eighth: *The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation,* the directors and the stockholders.

"(a)(1) Dwelling accommodations of the corporation shall be rented at a maximum average rental per room per month fixed by the Board of Directors of the corporation and approved by the holders of the Preferred Stock. A schedule of rentals for the reasonable rental value of each apartment based upon the average as so determined shall be filed with the holders of the Preferred Stock, prior to leasing or offering for lease of any of the dwelling accommodations of the project and when approved by them, shall thereafter be maintained except as provided in Article Sixth hereof. *Dwelling accommodations of the corporation shall not be rented for a period in excess of three years* nor shall the property be rented as an entirety without prior written approval of the
279 Preferred Stockholders. Store accommodations shall be rented at a rental to be fixed by the directors with the prior written approval of the holders of the Preferred Stock. (2) The corporation

shall have the right to charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between tenant and the corporation with the written approval of the holders of a majority of the shares of Preferred Stock, for any facilities and/or services which may be furnished by the corporation to such tenant upon his request, over and above the facilities and services to which such tenant may be entitled by virtue of his lease, including, among other things, telephone operator and switchboard services, electric current, gas, air cooling and conditioning and other additional or extraordinary facilities or services which may be furnished by the corporation in connection with the operation of such housing facilities.

"(b) The corporation shall maintain its accommodations and the grounds and equipment appurtenant thereto in good and substantial repair and condition; provided, that in the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money deriving from any insurance on the property shall be applied in accordance with the terms of the insured mortgage on the premises.

"(c) The corporation, its property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents and other papers relating thereto shall be subject to examination and inspection at any reasonable time by the Commissioner or his duly authorized agents; the corporation shall keep full and complete copies of all written contracts or other instruments which affect it or any of its property, all or any of which may be subject to inspection and examination by the Commissioner or his duly authorized agents.

"(d) The books and accounts of the corporation shall be kept in accordance with the uniform system of accounting prescribed by the holders of the Preferred Stock.

"(e) The corporation shall furnish the Commissioner within 60 days following the end of each fiscal year a complete annual financial report.

"(f) At the request of the Commissioner, or of the holder of a majority of shares of the Preferred Stock,

his or their agents, employees or attorneys, the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested."

280 From a casual reading of the foregoing, it is apparent that the charter is not the constitution of an independent corporation and that the preferred stockholder (F. H. A.) is not just a shareholder. *Loftus* v. *Mason, Commissioner, etc.*, 139 F. Supp. 207, an opinion by District Judge Bryan, Eastern District of Virginia, rendered February 10, 1956. The pertinent question is the extent of the broad powers granted to F. H. A. under the charter, the by-laws, the mortgage, and any contract to which the Commissioner and the corporation are parties. In the main, the Court is of the opinion that the documents referred to are essentially to protect the financial obligation of F. H. A. as an insurer of the mortgage, but are not so far-reaching as to restrict the right to lease individual apartments for periods of less than thirty (30) days.

The financial structure of Darlington is, as one would already assume, grounded upon the issuance of 100 shares of preferred stock at a par value of $1.00 per share, all of which is owned and held by F. H. A. The 1,999 shares of common stock are held as follows: The Long Corporation —1,996 shares; L. D. Long—1 share; Leonard L. Long—1 share; T. E. Steadman—1 share. In turn, the Long Corporation is solely controlled by L. D. Long; certain others hold qualifying shares for voting purposes. From this it will be seen that L. D. Long controls the plaintiff corporation.

The mortgage, mortgage note, and building loan agreement were executed by plaintiff on December 7, 1949, and, after some slight delay, the transaction was consummated on December 30, 1949. On the reverse side of the mortgage note in the sum of $1,357,700.00 appears the following language:

"Insured under Section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949.

To the extent of advances approved by the Commissioner.

FEDERAL HOUSING COMMISSIONER
By H. E. BAILEY
Authorized Agent

Date, December 30, 1949."

281 It is conceded by F. H. A. that, as of December 30, 1949, no specific provision of the charter, by-laws, mortgage, mortgage note, or any rule or regulation of F. H. A., restricted the right of plaintiff to lease apartments in its project for periods of less than thirty (30) days. In fact, the only period of limitation appears in the charter where it is said:

> "Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders."

It is significant that F. H. A. saw fit to impose a maximum rental period but overlooked what is now the partial subject of this controversy.

The project was completed in July, 1951; the first day of occupancy being July 27. By October 9, 1951, only 70 of the 156 apartments had been rented. As the project analysis contemplated a 7% vacancy, the plight of Darlington was inevitable. With no capital to purchase furniture for any of the apartments, the Long Corporation provided same and, from October 9, 1951, to February 21, 1952, furniture was provided in certain apartments rented for thirty (30) days or more. Beginning February 21, 1952, plaintiff rented furnished apartments to tenants for periods of less than thirty (30) days, as well as in excess thereof. This practice has been increasingly remunerative to the point that, for the first six (6) months of 1955 (the last period under consideration by the Court), plaintiff showed an operating profit as contrasted with net operating losses for all prior periods.

Darlington secured approval of its maximum average rental per room per month on September 18, 1951. There is no contention that plaintiff has charged in excess of this schedule unless the charge for furniture is considered. Plaintiff has not requested an approval of rentals for

furnished apartments as F. H. A. has taken the position that such approval will not be given unless Darlington executes a letter agreeing not to lease any portion of the premises to any person for less than thirty (30) days. F. H. A. first directed plaintiff's attention to the matter of furnished apartments and the agreement necessary to secure approval of a furnished apartment schedule
282 by letter dated December 5, 1952. Apparently F. H. A. was not disposed to force the issue at that time but awaited the passage of the Housing Act of 1954, Public Law 560, 83rd Congress, Chapter 649, 2nd Session, J. R. 7839, 12 U.S.C.A. § 1731(b).[2] The subject was there-

[2] The pertinent portions of the Housing Act of 1954 are quoted at length as follows:

"Sec. 513.(a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that *this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.*

"(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multi-family housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

"(c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) *no mortgage with respect to multifamily housing shall be insured for an additional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes,* and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property

after brought to life by letter of F. H. A. to plaintiff dated January 4, 1955, which did not make reference to the Housing Act of 1954. In reply, Darlington made a fair disclosure of its operations as to furnished apartments and inquired as to what provisions of law or charter prohibited the renting of apartments for a period of less than thirty (30) days. Plaintiff's letter was referred to defendant's Deputy Assistant Commissioner who, in turn, then directed plaintiff's attention to the Housing Act of 1954. The present action followed this exchange of correspondence.

283 The rather unique method employed by plaintiff in handling the rental of furnished apartments is the proper subject of close scrutiny. A party seeking one-

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or project for transient or hotel purposes while the mortgage insurance remains outstanding.

"(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

"(e) As used in this section, (1) the term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term 'multifamily housing' shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corporation or trust of the character described in paragraph numbered (1) of subsection (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3)(B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (3) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in

night occupancy at The Darlington is accepted,
284 directed to his room, and, upon leaving, is given a receipt (by way of illustration) in the sum of $6.00 with only plaintiff's name printed thereon. In the lower left corner of this receipt appears appropriate spaces for the allocation of the $6.00 as to rent, telephone, and "furniture rent". Plaintiff thereupon takes the copies of the receipt and credits one-thirtieth

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the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

"(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices, constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, whensoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

of the maximum average rental per room per month to the item "rent", with the balance being allocated to "furniture rent". For example, the sum of $2.58 would be charged to "rent" and $3.42 to "furniture rent". At least monthly the "furniture rent" credits are paid to Long Corporation, the owner of the furniture. This rather ingenious scheme is a mere subterfuge and the Court has no patience with same. Furthermore, Long Corporation pays no rent to plaintiff for the apartments in which its furniture remains, whether occupied or not. It may be argued that the availability of furnished apartments promotes the rentals, but F. H. A. admittedly controls the rental schedule on both furnished and unfurnished apartments. While the Court concludes that F. H. A. cannot prohibit the leasing of apartments for periods of less than thirty (30) days, and cannot insist upon any agreement to desist from such practice, it is nevertheless true that F. H. A. controls the maximum rentals at all times and an injunction must issue against plaintiff prohibiting the leasing of furnished apartments for any period of time until and unless a schedule has been duly approved; the injunction to become operative after F. H. A. has approved a fair and reasonable rent schedule for furnished apartments which need not coincide with any monthly schedule heretofore approved. Whether Darlington is the owner of the furniture is immaterial as the rental of the apartment, furnished or unfurnished, is an integral part
285 of the entire operation.

A study of the National Housing Act enacted June 27, 1934, 48 Stat. 1246 (1934), together with numerous amendments and additions thereto, with particular reference to Title VI, § 608, leads to the inevitable conclusion that it was the intent of Congress to provide housing accommodations on the mortgaged property *designed principally for residential use.* It is so stated in the Administrative Rules and Regulations of F. H. A. in existence as of the date of the insuring of the mortgage herein. F. H. A. insists that the word "principally" was intended to permit insurance of apartments on which commercial facilities were planned, such as drug counters, snack bars, etc. Plaintiff advances the theory that the word "principally" necessarily implies a right to rent to so-called transients, and argues that the doctrine of *expressio unius*

est exclusio alterius is applicable. In any event the word "principally" cannot be construed to mean "exclusively". It is not for this Court to delete or distort the words of Congress or the Commissioner. *62 Cases, etc.* v. *United States*, 340 U. S. 593, 71 S. Ct. 515, 95 L. Ed. 566; 82 C. J. S., "Statutes", p. 530, § 312. Does the leasing of certain apartments for periods of less than thirty (30) days alter the words "principally for residential use"? The Court does not believe that such an arrangement violates the intent of Congress when all factors mentioned herein are taken into consideration.

There has been no contention that plaintiff has failed to give preference to war workers and veterans, or has discriminated against families with children. These are requirements of the Act, but are not in issue. It is conceded that no person entitled to priority has ever been rejected, and no one desiring so-called "permanent" occupancy of an apartment has been required to wait any time to obtain same. While these provisions tend to support the view that this multifamily apartment was designed "principally for residential use", it may also be argued that the interpretation now requested by F. H. A. could have the effect of depriving a veteran of the preference granted to him by Congress in the event he wished to occupy an apartment for a period of less than thirty (30) days.

286 As the emergency created by returning veterans of World War II came to an end, the demand for multifamily apartments in certain areas was materially reduced. Faced with the necessity of maintaining mortgage payments, reserves for depreciation, operating expenses, etc., mortgagors sought other means of income in order to protect their investments. Furnished apartments proved to be an incentive for rentals and apparently F. H. A. has approved of such methods, thereby permitting a reasonable number of apartments to be rented on schedules duly submitted and approved. It is admitted that, prior to the passage of the Housing Act of 1954, F. H. A. granted permission in from 12 to 15 projects to rent for periods of less than 30 days, the right of which is contended to be under F. H. A.'s broad power of control of "methods of operation". When the attention of the American Hotel Association was directed to instances of

so-called transient rentals, a stern protest was registered which ultimately brought about the enactment of the Housing Act of 1954. The plaintiff herein does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients. Contrary to the contention of plaintiff, any such action would, in the opinion of the Court, violate that provision of the charter which prohibits engaging in any business other than the operation of a rental housing project. But the mere acceptance of transients as tenants does not, in and of itself, convert a rental housing project into a hotel. During March, 1955, there were 121 individual instances of rentals for less than thirty (30) days, of which 48 remained one day, 22 for two days, 12 for three days, 20 for seven days, etc. As March may be considered generally as the season of greatest demand for transients in Charleston, it is not unlikely that the figures quoted above give the largest illustration of so-called transient rentals. For that month there appeared to be an average of 15 furnished apartments rented, or available for rent, for periods of less than thirty (30) days. This is tantamount to approximately ten per centum of the entire available occupancy. This court is not of the opinion that a ten per cent rental allocation for persons desiring space for periods of less than thirty (30) days is the equivalent of converting the project into a hotel when unaccompanied by any act of advertising for transients as a hotel. While the factual situation is somewhat different, this Court leans to that part of the opinion in *People* v. *Goldfogle*, 121 Misc. 287 Rep. 341, 201 N. Y. Supp. 262, 264, where it is said:

"The mere fact that a building constructed and operated as a hotel in the common acceptance of that term may be occupied by a few tenants on long leases would certainly not change the character of the building as a whole. The converse is true here. The rooms occupied by transients, forming but 20 per cent. of the total number of rooms, are being so used only temporarily in order to derive an income therefrom pending attempts to lease them for long terms, like the rest of the rooms. Even the 'transient' rooms are charged for by the room, and not by the number of persons who may occupy them. The building is without any of the public rooms or public accommodations usually

associated with the idea of a hotel. Under these circumstances, I think that the building is to be regarded as having maintained its original character of an apartment house, unaffected by the casual fact that some of the rooms are temporarily devoted to purposes which have some of the elements of hotel accommodation."

The unusual situation created by reason of F. H. A.'s insistence to cease the practice of renting apartments for periods of less than thirty (30) days will admittedly necessitate the financial downfall of Darlington, with the resultant loss of an initial investment, together with the monthly payments of $6222.79 each, beginning June 1, 1951, as well as a reserve account, etc. It certainly would not justify the continued existence of Darlington and bankruptcy would be the ultimate answer. A foreclosure of the mortgage would follow with the Commissioner of F. H. A. acquiring title as it is a fair assumption that no purchaser at said sale would bid an amount equal to, or in excess of, the unpaid balance due on said mortgage. The mortgagee is obligated to acquire title under such circumstances and assign that title to the Commissioner who, in turn, sells the property without regard to any limitation as to use, etc., unless, of course, F. H. A. insures a new mortgage on the project. The result is that a foreclosure is likely to bring about a hotel with its right to advertise and operate as such—the mortgagor would lose its investment—F. H. A. would undoubtedly be called upon to pay a substantial sum by reason of its insurance obligation to the mortgagee—and no one would profit.

The position of the American Hotel Association is not without merit. Investments in hotels are substantial and such enterprises have been without the aid of 90% to 100% financing guaranteed by an agency of the United States. The promotion of motels has made serious inroads on operation of hotels. It may be readily understood why the Hotel Association exerted its efforts to persuade Congress to pass the Housing Act of 1954, thus defining transient rentals and prohibiting leases in F. H. A. insured projects for periods of less than thirty (30) days. As to projects committed subsequent to the passage of the 1954 Act, there can be no question as to its constitutionality or applicability. But with respect to projects

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already in operation, this Court has concluded that the Housing Act of 1954 is ineffective as, under the circumstances, it cannot be made retroactive. A careful study of the 1954 Act will illustrate that plaintiff's right to lease for periods of less than thirty (30) days undoubtedly existed prior to that date despite the primary intent of Congress. Under what theory, then, may Congress take away that right which is not, in itself, contrary to any law, rule, or regulation? This case does not involve the exercise of police power, war powers, zoning laws, tariff laws, export and import licensing, emergent or tax legislation—all of which have, in one form or another, upheld the validity of retroactive legislation. When the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. *Lynch* v. *United States*, 292, U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434. As was said in *Union Pacific Railway Co.* v. *United States*, 99 U. S. 700, 25 L. Ed. 496, 504:

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or
> 289 a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

To the same effect, see: *The Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. (17 U. S.) 518, 4 L. Ed. 629. Even if it could be successfully argued that plaintiff had no vested right to lease an apartment for a period of less than thirty (30) days, the effect of the Housing Act of 1954 undoubtedly attempts to create a new obligation with respect to a past transaction and hence must fail. 16 C. J. S., "Constitutional Law", § 417, p. 861. To open an avenue for retroactive or retrospective laws in the field of contract not dealing with police, war, or emergent powers, would have a very serious effect in the commercial world which has become so involved with government financing and other related subjects. In substance, there must be a stopping point somewhere, and this appears to illustrate the dangers involved where Congress has yielded to the requests of a third party with knowledge that there will be a financial loss to the mortgagor and, to a limited extent, the taxpayers.

It is the duty of the Court to determine the intent of Congress as to the meaning of any law passed. *Stockdale* v. *The Insurance Companies,* 20 Wall. (87 U. S.) 323, 22 L. Ed. 348; *Town of Koshkonong* v. *Burton,* 104 U. S. 668, 26 L. Ed. 886. The expressions of the members of the legislative body are entitled to respect and consideration in determining what the rule or law was at the time of passage, but if the Court is reasonably satisfied that the later expression or construction is erroneous, the same should be disregarded. It is interesting to note that, at the time of the hearings on the Housing Act of 1954 before the Senate Committee on Banking and Currency, Senator Capehart, who presided over the meeting, said:

> "I didn't write the law, it was written back in 1940. I wasn't here, so I can't tell what the intention was."

While it may be assumed that some members of Congress in 1954 were also members in 1940, and even in 1934 when the original National Housing Act was passed, there is no affirmative intimation of Congressional intent other
290 than from the wording of the 1954 Act and the Committee reports. In truth and in fact, the question now under consideration was never given a thought. In the desire of Congress to fulfill the need for housing, only such matters as the needs of war workers, veterans, families of veterans, and the customary soundness of the

transaction from a financial standpoint with its attendant restrictions were the subject of legislation and intention.

If the Administrative Rules and Regulations for Rental Housing Insurance under Section 608 of the National Housing Act, as amended May 22, 1946 (which Rules and Regulations were in existence at the time of the commitment, insurance and construction of the Darlington project), are to be given any effect as to the intent of Congress prior to 1954 or as to the final determination of this case, it is abundantly clear that there was no intention to thereafter create a new obligation with respect to a past transaction assuming, of course, that the operation by the mortgagor was not *per se* unlawful. Article VIII of said Rules and Regulations covering the matter of "Amendments" states:

> "These Regulations may be amended by the Commissioner at any time and from time to time, in whole or in part, *but such amendments shall not affect the contract of insurance on any mortgage already insured* or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure."

At the time hearings were conducted before the Senate Committee on Banking and Currency in March, 1954, Mr. Arthur J. Packard, Chairman of the Board of the American Hotel Association, made this pertinent statement:

> "As I mentioned before, we have tried for four or five years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743(b)(1), in connection with section 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved. At the outset, the agency always required approval of all rent schedules. And these were normally expressed in monthly rentals. But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice." (Page 656, 657. Hearings before Senate Banking and Currency Committee on Housing Act of 1954.)

The statement of Mr. Packard is questioned by the testimony of the Director of the Legal Division of F. H. A. as being somewhat erroneous, but the fact that F. H. A. apparently did not resort to any legal process in an effort to bring about a cessation of such practices affords a fair assumption that the interpretation placed thereon by the Administrative Ageney was at least doubtful.

It is true that the Commissioner has always retained the authority to regulate rents, charges, and "methods of operation". This is so specified in the Act. 12 U.S.C.A. 1743(b)(1). What, then, is the meaning of the words "methods of operation"? Should it be given a broad interpretation which would, in effect, grant to F. H. A. the rights ordinarily reserved to an owner of real estate? The answer to these inquiries may be found in the interpretation placed thereon by F. H. A. In a bulletin entitled "Multifamily Rental Housing Insurance" providing for the Administrative Rules and Regulations under Section 207 of Title II of the National Housing Act, revised August 13, 1954 (the forerunner and successor of Section 608), the Commissioner significantly points out what is meant by the term "Methods of operation". Reg. § 232.19(f). Without quoting verbatim what is contained therein under "methods of operation", it is sufficient to state that, for the proper consideration of this case, the items mentioned are substantially the same as the items referred to in Darlington's charter subsequent to the words, "The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation, the directors and the stockholders". True, in the 1954 revision, a special clause was inserted in Reg. § 232.20(b) under the heading "Special certificates and contract to be executed by mortgagor", prohibiting the rental of any part of the property "for transient or hotel purposes", and further providing that the mortgagor's charter shall contain like provisions. This is potent evidence of the fact that, prior to 1954, it had never been the intention of F. H. A. or Congress to prohibit any practice of leasing for periods of less than 30 days, and, further, that the term "methods of operation" was not intended to include a like prohibition. If such

is not the case, what would be the purpose of F. H. A. in requiring these specific provisions in corporate charters?

Assuming arguendo that plaintiff's stockholders
292 had sold their stock in Darlington shortly after the completion of the project, how would any new owner of the capital stock ascertain that such an intent or regulation existed as now suggested by F. H. A.?

It must be recalled that F. H. A. is in the insurance business and that Congress, in launching a governmental agency into the commercial world, endowed it with the authority to sue and be sued and contemplated that it would be treated as any private enterprise. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724. Similarly, it has been held that regulations promulgated by F. H. A. are to be construed against F. H. A. *Ferguson* v. *Union National Bank*, 4 Cir., 126 F. (2d) 753, an opinion by Chief Judge Parker; *Garrison* v. *United States*, 7 Wall. 688, 690, 19 L. Ed. 277. Adopting this rule of construction, there is no sound reason for arguing that plaintiff did not have a right given to it in the legitimate use and enjoyment of its property to rent a reasonable number of apartments for periods of less than thirty (30) days. Furthermore, there is no magic in the selection of thirty (30) days.

The Housing Act of 1954 discriminates against plaintiff in that it empowers the Commissioner to exclude the operation of the "transient rental" clause located in a resort area from the provisions of the Act if a portion of the accommodations in the project had been made available for rent for "transient or hotel" purposes prior to May 28, 1954. Through the efforts of Senator Smathers (Florida), this provision was inserted and, in effect, the entire State of Florida was designated as such. The "608 projects" in Florida and other resort areas were constructed under the same charter, mortgage, rules and regulations as was Darlington. Moreover, it will be noted that the sales promotion advanced by F. H. A. during the years following World War II and prior to the Korean War suggested to sponsors that mortgages could be refinanced or insured for additional terms if the same became necessary. While there is no legal obligation upon F. H. A. to insure for an additional term, the Housing Act of 1954 effectively fore-

closes this possibility as to all multifamily housing projects except those which are excluded by reason of being
293 situated in resort areas.

Additionally, Congress apparently was uncertain as to its right to legislate retroactively when it inserted in the 1954 Act the words:

> "*Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954."

That the 1954 Act is designed to afford relief for private interests, as distinguished from public purposes, is further evidenced by the clause which grants a right to any person owning or operating a hotel within a radius of fifty miles from the "project" to institute an action in the appropriate District Court enjoining the alleged violation.

Even assuming the right of Congress to delegate the power to "regulate" to an administrative agency, the agency exercising such authority pursuant to contract will not be permitted to negate the plain words of the contract by adding regulations subsequent to the date the agency committed itself. Such authority would completely destroy the contract.

A decree will be prepared by counsel for plaintiff adjudicating its rights under the declaratory judgment action, stating in substance:

1. The defendant and its Commissioner have no right to prohibit the rental of a reasonable number of apartments in The Darlington for periods of less than thirty (30) days, as long as priorities are maintained for the persons entitled thereto and no proper person desiring occupancy for a period of thirty (30) days or more is thereby precluded from obtaining accommodations.

2. If any of said accommodations are furnished by plaintiff, or permitted to be furnished by plaintiff, said plaintiff shall promptly submit to defendant a proposed schedule of maximum average rentals (including furniture and other incidentals) and, if fair and reasonable under all the circumstances, defendant shall approve said schedule and

plaintiff will thereupon be enjoined from making any rental charges, directly or indirectly, in excess of the approved schedule.

294 3. The defendant may not insist upon plaintiff's execution of any agreement to desist from renting for periods of less than thirty (30) days as a condition precedent to the approval of a rental schedule for furnished apartments to be leased for periods of less than three (3) years, irrespective of the minimum time of leasing.

4. The plaintiff has no right to advertise as a hotel or to advise the general public through any medium of advertising or letters of its willingness to accept so-called transients; nor may plaintiff obtain any license to operate as a hotel or post any signs indicating its ability to accept any tenant for periods of any particular duration. No injunction need issue as to such matters as there is no contention that plaintiff is operating as such.

5. Both parties having prevailed herein to a limited extent, the taxable costs, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, shall be equally divided.

6. Should either party file a notice of appeal within the time permitted from the date of the entry of the decree to be submitted, the effectiveness of said decree will be stayed for a period of forty (40) days to permit the appealing party or parties to obtain an appeal to said decree in the Court of Appeals for the Fourth Circuit, if they be so advised.

WALTER E. HOFFMAN
United States District Judge
(under Designation)

Norfolk, Virginia
June 20th, 1956

(File endorsement omitted)

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MICRO-FILMED

CIVIL ACTION 4741

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

THE DARLINGTON, INC., *Plaintiff*,

v.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Decree—July 18, 1956

This cause came on to be heard upon plaintiff's complaint by way of declaratory judgment and defendant's motion to dismiss the complaint under Rule 12(c) of the Federal Rules of Civil Procedure, which was converted into a motion for summary judgment under Rule 56, and evidence having been offered, briefs filed and argument presented by both parties, and upon consideration thereof, the Court having filed its opinion on June 21, 1956, disposing of all issues involved, now pursuant to said opinion, it is hereby

ORDERED, ADJUDGED AND DECREED as follows, viz.:

(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided the required priorities are maintained for the persons entitled thereto, namely, veterans of World War II, and their immediate families, and provided that no proper person desiring occupancy for a period of thirty days or more is thereby precluded from obtaining unfurnished accommodations, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered. The parties have stipulated that, for the purpose of the Court's opinion filed herein, the

maximum number of apartments available for lease for terms of less than thirty days shall not exceed fifteen per cent of the total number of apartments in the project until the further order of Court or subsequent agreement
296 between the parties.

(2) The plaintiff shall promptly submit to the defendant a proposed schedule of the maximum average rentals (including furniture and other incidentals and services) for any furnished accommodations in said building, and if fair and reasonable, under all the circumstances, the defendant shall promptly approve said schedule without regard to any monthly rental schedule heretofore approved, and in approving said schedule, the defendant shall take into consideration extra services and incidentals necessarily furnished with such apartments which may be rented for less than thirty days, and the plaintiff shall thereupon be enjoined from making any rental charges directly or indirectly in excess of the approved schedule.

(3) The defendant may not insist upon the execution by the plaintiff of any agreement to desist from renting for periods of less than thirty days as a condition precedent to the approval of a rental schedule for furnished apartments to be leased for periods of less than three years, irrespective of the minimum time of leasing.

(4) The plaintiff has no right to advertise as a hotel or to advise the general public through any medium of advertising or letters, of its willingness to accept so-called transients; nor may plaintiff obtain any license to operate as a hotel, or post any signs indicating its ability to accept any tenant for periods of any particular duration; nor shall it provide bell boy or food and beverage room service.

(5) The taxable costs of this action, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, are to be borne equally by plaintiff and defendant, one-half of such costs to be taxed against each party.

(6) Should either party file a notice of appeal within the time permitted from the date of entry of this Decree, the effectiveness of said Decree will be stayed for a period of forty (40) days to permit the appealing party or par-

ties to obtain an appeal to said Decree in the Court
297 of Appeals for the Fourth Circuit, if they be so advised.

WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
July 18, 1956.

SEEN:

CARL EARDLEY
Special Litigation Counsel
Department of Justice

HERMAN H. HIGGINS, JR.
Of Counsel for Plaintiff

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305 IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

C/A 4741

THE DARLINGTON, INC., *Plaintiff*,

vs.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Transcript of Hearing of May 24, 1957

A hearing before a 3-Judge court was held in the United States Courtroom at Charleston, South Carolina, on the 24th day of May, 1957, at 10 o'clock a. m., the said court being composed as follows:

Honorable Clement F. Haynsworth,
United States Circuit Judge
Honorable George Bell Timmerman,
United States District Judge
Honorable Walter E. Hoffman,
United States District Judge

APPEARANCES:

J. C. Long, Esq.,
H. H. Higgins, Jr., Esq., and
William Grant, Esq. (admitted *pro hac vice*)
For Plaintiff.

306 Arthur G. Howe, Esq.,
Assistant U. S. Attorney, and
Carl Eardley, Esq.,
Special Attorney,
Department of Justice,
For Defendant.

Colloquy Between Court and Counsel

JUDGE HAYNSWORTH: Gentlemen, this is a special 3-Judge court convened under Order of the Supreme Court to hear the case of *The Darlington, Inc.*, vs. *Federal Housing Administration.*

MR. LONG: If the Court pleases, at this time I would like to introduce Mr. William Grant of Atlanta, an attorney who represents the plaintiff generally, and who I would like to have admitted for the purpose of participating in this case. Also I would like to introduce Mr. Kirk McAlpine, an attorney from Savannah, Georgia.

JUDGE HAYNSWORTH: Yes.

MR. LONG: If your Honors please, I must confess that this is my first experience with a 3-Judge court of this character, after some 30-odd years of practice. I don't know what the procedure is and I am at a loss just how to start. We are the plaintiff in this action.

JUDGE HAYNSWORTH: I understood that the parties had agreed that this case would be heard on the record that was made earlier before Judge Hoffman.

MR. LONG: That is right, your Honor, with this exception: That it *would* heard on the record in the previous case with our right to introduce one exhibit which the Federal Housing Administration has promulgated since the case started, just that one. We have it here.

307

JUDGE HAYNSWORTH: Have you got it?

MR. LONG: We have that.

JUDGE TIMMERMAN: What is the relevancy of it?

MR. LONG: The relevancy of it, your Honor, is to show that the Federal Housing Administration, in its new charter, has put in the charter that you cannot rent for 30 days or less, showing an admission, as we say, that they recognize now that it was necessary in the charter in order to prohibit rentals for 30 days or less, and further to show that it has waived any requirement as to the amount that might be charged for rent as long as you will agree not to rent for 30 days or less, and if you will agree to that, it doesn't care what you do, and which we say goes to the '54 act to show that they are trying to find some appropriate remedy to carry out——

JUDGE TIMMERMAN: Well that is in the argument. I get you.

JUDGE HAYNSWORTH: Is there any objection to this?

MR. EARDLEY: No.

MR. LONG: We have photostat copies, and we have one copy for each one of the Court.

JUDGE TIMMERMAN: Do you have other exhibits?

308 MR. LONG: If your Honors please, in reference to the other exhibits, I was surprised to find yesterday on a visit to the Clerk's office that the United States Supreme Court has not returned them. I don't think, however, that there will be any question as to the contents of those exhibits. They are referred to in the transcript.

JUDGE TIMMERMAN: I wasn't worried about that. I was just thinking what number should be assigned to this exhibit.

MR. LONG: I think it will be Plaintiff's 41st.

JUDGE TIMMERMAN: I didn't know whether you had numbers or letters on them.

MR. EARDLEY: It will be 43rd.

MR. LONG: It would be 43rd.

JUDGE TIMMERMAN: It would be Plaintiff's 43rd.

JUDGE HAYNSWORTH: Let it be received as Plaintiff's Exhibit 43.

FEDERAL HOUSING REGULATION dated August 17, 1956, marked in evidence as *Plaintiff's Exhibit No. 43.*

. . . . . .

(File endorsement omitted)

324 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

CIVIL ACTION NO. 4741

THE DARLINGTON, INC., *Plaintiff*,

v.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Before Haynsworth, *Circuit Judge*, and Timmerman and Hoffman, *District Judges*.

J. C. Long, H. H. Higgins, Jr., and William Grant, *for Plaintiff*; Arthur G. Howe, Assistant United States Attorney, and Carl Eardley, Special Attorney, Department of Justice, *for Defendant*.

Opinion—Filed July 13, 1957

325 *Per Curiam:*

In this declaratory judgment proceeding, plaintiff, the owner and mortgagor of a twelve-story multifamily apartment building financed under the provisions of Title VI, sec. 608, of the National Housing Act, seeks a declaration of its rights to lease certain apartments in said project for periods of less than 30 days.

When the action was originally presented to District Judge Hoffman, sitting by designation, the District Judge requested that a three-judge court be convened because injunctive relief was asked to restrain an Act of Congress passed in 1954 [1] on the ground that it was unconstitutional. The three-judge court, in a *per curiam* opinion reported in 134 F. Supp. 337, was dissolved and Judge Hoffman proceeded to hear the merits of the controversy. The opinion of the single Judge is reported at 142 F. Supp. 341. The Federal Housing Administration appealed directly to the United States Supreme Court where probable jurisdiction was noted, the judgment was reversed, and the case

[1] Housing Act of 1954, Public Law, 560, 83rd Congress, Chapter 649, 2nd Session, H. R. 7839, 12 U.S.C.A. § 1731(b).

was remanded for consideration by a three-judge district court. 352 U. S. 977.

In obedience to the mandate issued pursuant to the aforesaid action, the three-judge district court was convened. Counsel agreed, with the introduction of one additional exhibit and the supplementary testimony of one witness, to submit the matter on the basis of the record presented to District Judge Hoffman.

326 Upon consideration of the entire record, the briefs and argument of counsel, this court is in accord with the opinion of Judge Hoffman and herein incorporates the same by reference. With one minor correction and a brief comment as to our views, we are adopting the findings and conclusions of District Judge Hoffman.

It is stated in the opinion that the Act grants preferences to war workers and veterans. A review of the provisions leads us to the conclusion that the preference established by Congress was confined to veterans and their families. War workers are not mentioned therein. In this connection it will be noted that at no time since the completion of plaintiff's apartment project in July, 1951, has any person entitled to priority been rejected or required to wait any period of time to obtain occupancy of an apartment.

When Congress passed the Housing Act of 1954 declaring its intent "since the enactment of the National Housing Act" to the effect that housing built with the aid of mortgages insured under the former Act was to be used "principally for residential use", it injected the last quoted words into the Act relating to "608 projects" for the first time. True, similar language had been used in related provisions of the National Housing Act, but the amplification of this "intent" to exclude the use of such housing for transient or hotel purposes while the insurance on the mortgage was outstanding makes its first appearance in the Act of 1954.

We cannot agree that an absolute prohibition, as here applied against rentals for less than thirty days, is

327 within the reserved power of the Federal Housing Authority to regulate rentals and methods of operation as provided in the Act prior to the 1954 amendment.

There is little doubt but that this project was designed "principally for residential use" within the meaning of

the National Housing Act of 1934, and that all but a small proportion of the rentable space is rented for periods exceeding 30 days. The evidence is uncontradicted that no qualified applicant has been delayed in obtaining, or denied, occupancy of apartments under leases of 30 days or more. The operators of the project do not undertake to provide many of the services expected by guests in hotels. All that is involved here is the right of the mortgagor to lease apartments, otherwise unrentable, for periods of less than 30 days.

To the extent that transient rentals may have interfered with the project's service of the stated purpose of the Act, there is room for argument that the Authority could, prior to the 1954 amendment, exercise its reserve power to regulate the methods of operation, and it may be contended that such power extends to the prohibition of transient rentals although we do not find it necessary to so declare. But when no such interference is shown, the only effect of the prohibition is to impair the financial ability of the mortgagor to meet its obligations under the mortgage.

The reserved power to regulate methods of operation is referable to, and limited by, the stated and implied purposes of the Act. It cannot be construed to extend to a regulation which, as applied, serves no purpose of
328 the Act, but contravenes the general purpose of the Act by increasing the likelihood of financial loss under the guaranty of the mortgage.

Since Judge Hoffman rendered his opinion in this case, the Federal Housing Administration has prepared and caused to be circulated a revised model form of certificate of incorporation which strictly limits the right to rent units for periods of less than 30 days. We find no fault with the right of Congress to provide such limitations as to projects not committed at the time of the passage of the Act of 1954, or the power of the Commissioner under Section 513(c) of the Act of 1954 to impose such restrictions as a condition of a grant of an extension of the term of the insurance. We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation.

Order accordingly.

I concur:—Walter E. Hoffman, U. S. D. J., Clement F. Haynsworth, Jr., U. S. Circuit Judge.

I concur:—George Bell Timmerman, U. S. District Judge, July 8, 1957.

(File endorsement omitted)

329 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

THE DARLINGTON, INC., *Plaintiff*,

vs.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Decree—September 4, 1957

This cause came on to be heard upon plaintiff's complaint seeking a declaratory judgment and defendant's motion to dismiss under Rule 12(c) of the Federal Rules of Civil Procedure, which was converted into a motion for summary judgment under Rule 56, and evidence having been offered, briefs filed and argument presented to this Court by both parties, and upon consideration thereof, the Court having filed its opinion on July 13, 1957, disposing of all issues involved, now pursuant to said opinion, it is hereby

ORDERED, ADJUDGED AND DECREED as follows, viz.:

(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided that any veteran of World War II, his immediate family, or any other proper person desiring occupancy for a period of

330 thirty days or more is not thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered.

(2) Except to the extent that the following conditions shall be lawfully varied, changed, suspended or removed (i) pursuant to any applicable provision of the National Housing Act as the same may be amended, or any lawful regulation or administrative order issued thereunder, (ii) in accordance with an agreement between the parties in this action, or (iii) in accordance with any further order of this Court, the plaintiff herein shall observe and comply with the following conditions:

(a) The plaintiff shall not lease, or make available for leasing, for terms of less than thirty days more than 15% of the total number of apartments in the project.

(b) The plaintiff shall not increase its schedule of rents and charges now in effect for rentals of apartments for less than thirty days and for furnishings and other incidentals offered or supplied in connection therewith.

(c) The plaintiff shall not advertise itself as a "hotel", nor shall it through the use of any advertising medium, the circulation of letters, the maintenance of signs, or otherwise solicit the business of transients for less than thirty days occupancy, or advise the general public of its
331 willingness to provide accommodations for transients for periods of less than thirty days occupancy.

(d) The plaintiff shall not provide occupants of its project with food or beverage room service or maintain regular bell boy service.

3. Except as otherwise provided herein, the defendant may not compel the plaintiff to desist from the rental of apartments for less than thirty days nor may it condition its approval of any application which the plaintiff may file for approval of changes in its schedule of rentals, or charges for other services, upon an agreement by the plaintiff to desist from such rentals.

4. The taxable costs of this action, including the expenses of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, are to be borne equally by plaintiff and defendant, one-half of such costs to be taxed against each party.

5. Jurisdiction of the cause and the parties to this action shall be retained for the purpose of entering such further orders and decrees as may appear to the Court, or any Judge thereof, to be appropriate and not inconsistent with the opinion heretofore filed.

/s/ CLEMENT F. HAYNSWORTH, JR.
United State Circuit Judge

GEORGE BELL TIMMERMAN
United States District Judge

/s/ WALTER E. HOFFMAN
United States District Judge

September 4th, 1957

(File endorsement omitted)

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JUDGE'S COPY

CIVIL ACTION 4741

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

THE DARLINGTON, INC., *Plaintiff*,

v.

FEDERAL HOUSING ADMINISTRATION, *Defendant*.

Notice of Appeal to the Supreme Court of the United States—Filed October 2, 1957

I

NOTICE IS HEREBY GIVEN that the Federal Housing Administration, the defendant above named, hereby appeals to the Supreme Court of the United States from the final decree entered in this action on September 5, 1957.

This appeal is taken pursuant to 28 U.S.C., Section 1253.

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in this transcript the following: The entire record of the District Court.

III

The following questions are presented by this appeal:

1. Whether appellee's rental of apartments to transients was prohibited prior to the Housing Act of 1954, in view of the purpose of the earlier legislation and the nature of appellee's undertaking to limit its business to a rental housing project consisting of dwelling units.

2. Whether the explicit prohibition of the 1954 Act was beyond the power of Congress, as applied to a project theretofore approved.

N. WELCH MORRISETTE, JR.
United States Attorney

By ARTHUR G. HOWE
Assistant United States Attorney
Attorney for the Federal Housing Administration

Charleston, S. C.
October 2, 1957.

337 Clerk's Certificate to foregoing Transcript
(Omitted in printing)

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338 SUPREME COURT OF THE UNITED STATES

No. 628—October Term, 1957

FEDERAL HOUSING ADMINISTRATION, *Appellant*,

vs.

THE DARLINGTON, INC.

APPEAL FROM the United States District Court for the Eastern District of South Carolina.

Order Noting Probable Jurisdiction—January 27, 1958

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

(p. 134)

Plaintiff's Exhibit No. 8

United States of America

FEDERAL HOUSING ADMINISTRATION
WASHINGTON

August 16, 1954

PURSUANT to the provisions of section 1733, chapter 115, title 28 of the d States Code (62 United States Statutes at Large 946), I hereby certify the annexed copy of letter dated January 7, 1947 from Franklin D. Richards to rectors of all Field Offices, together with attachment

Admitted subject to
further objection
by the Court

340 NATIONAL HOUSING AGENCY
FEDERAL HOUSING ADMINISTRATION
Washington 25, D. C.
January 7, 1947

To: Directors of All Field Offices
Subject: Rental Housing Program for Veterans

By now, all Directors and their staffs have read and thoroughly understand the contents of Commissioner Foley's letter dated January 2, 1947 and realize the responsibility imposed upon each Director to put the "Rental Housing Program for Veterans" into effect in his own State or District immediately.

A "suggested pattern" or outline covering arrangements to be made and the conducting of meetings with industry has been prepared by a special committee of Directors and will be mailed to you under separate cover.

In the meantime, the attached circular letter will be reproduced in each Field Office and given Statewide distribution, utilizing such mailing lists which may be available, including approved mortgagees, lumber dealers, realtors, architects and builders.

Each Director will notify his Zone Commissioner as soon as this mailing has been completed, sending copy of the Circular Letter and stating the total number by classification to whom it was mailed.

Very truly yours,

Franklin D. Richards
Assistant Commissioner

Attachment
72733

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341 To: Architects, Realtors, Builders, Dealers, Manufacturers and Representatives of Financial Institutions, State of _____.
Subject: Rental Housing Program for Veterans

I. Statement of the President

1. In connection with the Housing Program For 1947 as announced by the President on December 23, 1946, he stated, in part, as follows:

"I am determined that a vigorous housing program will continue to be carried out in 1947. . . . The main point of emphasis for 1947 is rental housing. . . . Within the total number of homes to be

built, it is of major importance that a maximum number of rental units be provided. . . . More family units must be made available for rent to veterans. They should not be compelled to buy in order to get shelter. To increase the proportion of rental units, we intend to use all available means—new construction, conversion and rehabilitation, and re-use. The great bulk of this task will fall upon private enterprise."

II. Commissioner Foley's Statement of FHA Policy

1. In a letter to the Directors of all Field Offices of the FHA dated January 2, 1947, Commissioner Raymond M. Foley stated:

"a. To accomplish these objectives of the Rental Housing Program for Veterans the Federal Housing Administration will utilize to the fullest possible extent every facility at its disposal to encourage the immediate construction of rental housing for veterans.

"b. A comprehensive program has been designed to produce rental units that will be made available to veterans at relatively low rentals—at rentals in the intermediate range—and up to the maximum $80.00 average rental.

"c. All Directors are charged with the responsibility of securing the full cooperation of all branches of industry in order to accomplish this objective.

"d. Means have been devised for State and District Directors and their staffs to set this program in motion at once.

"e. Immediately effective policies governing this all-important program have been outlined—every phase of our operations is geared to the production of veterans rental housing."

III. State-Wide Program Launched

1. In accordance with the above directives this office is planning a State-wide program to be launched immediately and expects to secure the full cooperation of all interested groups of industry throughout the State in order to accomplish the stated objective in each community of (state).

342 2. Every effort will be put forth by all personnel of this office to assist individuals who are

interested in sponsoring rental housing projects—such projects to be a two, three, or four-family dwelling financed under Section 603—an eight family apartment or larger project under Section 608—or a reconversion job under Title I.

3. Action is being taken by our Washington Office to simplify our procedures in order to expedite the processing of applications under all phases of FHA financing. Some of the steps already taken are outlined herein.

IV. FHA Financing of Rental Projects

1. *Section 608—Rental Housing*

a. Effective immediately, "Minimum Property Requirements for Three or More Living Units" will be used as a guide only (except for statutory provisions) in both Sections 603 and 608 cases, and our Underwriting staff will accept alternates that will produce structurally sound rental projects evidencing continued tenant appeal.

b. Requirements as to application forms, preliminary drawings, specifications and exhibits will be simplified to enable complete but expeditious processing.

c. A simplified cost estimate procedure has been devised and adopted.

d. Other simplification methods adopted include a change to permit an *average rent of $80.00 per unit, reduction of initial principal payment from 2% to 1½%* of the original face amount of the mortgage, authorization to *increase the mortgage* where such increase is justified and the acceptance of proposals for construction of two or more projects constituting a large development, whereby certain attractive aspects will be afforded including tax advantages, increased scope of saleability and less rigid regulatory requirements.

e. Action has been taken to expedite the handling of requests for *prevailing wage determinations* by the Department of Labor and provisions made for the *adjustment of mortgage terms*, where it is deemed necessary in order that rental projects,

constructed under the present emergency, may continue to maintain their competitive market position.

f. An added tool in solving the rental housing problem is provided through *rehabilitation programs* made possible under new provisions of Section 608, whereby existing structures may be reconstructed into additional rental units and financed under a 608 mortgage.

343 2. *Rental Housing—Section 603*

a. While it is expected that a large segment of the need for rental housing will be met by the construction of multi-family rental projects, both large and small, under Section 608, the Federal Housing Administration will lend strong encouragement to the development and construction of a large number of rental units in two-, three-, and four-family structures to be insured under Section 603 of Title VI.

b. Rules and regulations and processing instructions under Section 603 provide a simple financing device for the immediate construction of large numbers of rental units in two-family to four-family structures. Large projects under single sponsorship may be expeditiously handled under Section 603 by suitably grouping separate real estate parcels in groups of two or three or four individual mortgageable entities.

c. In those instances where present mortgage ceilings under Section 603 appear somewhat restrictive in relation to current costs to accommodate such rental projects, the facilities of Section 608 provide an effective complement to the provisions of Section 603 in the financing of all types of rental projects. If sponsors are primarily interested in the subsequent sale of completed rental projects, suitable release clause provisions may be worked out to accommodate individual circumstances.

d. The provisions of Section 603 will be particularly suited to the ready financing and construction of rental properties in smaller communities.

e. Further, Section 603 provides a suitable financing device under which smaller builders may be interested in the Rental Housing Program and similarly, it provides rental investment opportunities for non-veteran investors who may be interested in owing rental projects, occupying a single unit and renting the other units to veterans.

f. In both large and small communities the attention of equity investors is invited to the attractive investment possibilities in the ownership and management of rental projects.

3. *Title I Conversion Loans*

a. To attain the objective of providing the maximum number of rental units in the shortest possible time the part played by conversion jobs is of equal importance to new construction in that every possibility to produce additional units should be pushed to the limit under the "Memodel For Veterans Program".

b. During the past year, the FHA has approved priority applications for conversions to provide over 113,000 living accommodations. A tremendous impetus has been given to the conversion program and with the increasing flow of building materials, it is felt that a substantially greater number of living units can be created in the coming year. Additional rental units are needed in every community and every community now has many structures that, with imagination, planning and initiative, will provide desirable rental space.

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c. The $5,000 conversion loan under Title I with a maximum term of 7 years and 32 days offers an attractive financing plan to lending institutions, contractors and material dealers, as well as property owners interested in obtaining additional income from old properties.

V. Meetings With Industry

1. A schedule of meetings to be conducted in the principal cities of (*State*) beginning not later than Janu-

ary 21, 1947, is being arranged in cooperation with all branches of industry and others.

2. Interested groups such as architects, realtors, builders, dealers, manufacturers, and lending institutions in the cities in which the meetings are to be held and those located in near-by towns will be invited and urged to attend.

3. In addition full information will be furnished the newspapers and sent out over our mailing lists in order that the full facilities of this office and the advantages of the FHA plan of financing may be made available in every community of the state of (*name of State*).

4. Never before has such a housing challenge been placed before private enterprise. Never before, in the history of the Federal Housing Administration, has there been so great responsibility placed upon us. We expect to discharge this responsibility to the limit of our ability, and sincerely feel that we can depend upon the willing cooperation of all groups throughout the State who are directly effected by the program.

Very truly yours,

_____

(*State or District Director*)

345 INCL. NO. 1 TO ACCOMPANY "SUGGESTED PATTERN" FOR MEETINGS WITH INDUSTRY

(To be mailed *as soon as possible* to Secretary, Chamber of Commerce (or other appropriate group) in all Cities with 5,000 population or more)

(READING)

(DATE)

To: SECRETARY, CHAMBER OF COMMERCE, (CITY & STATE)

SUBJECT: HOUSING PROGRAM FOR 1947

In order that we may keep the builders, dealers and financial institutions of your community informed on the new Housing Program for 1947 and changes being made in the FHA regulations and procedure, it is requested that the enclosed blank mailing list be completed and returned to this office as soon as possible.

Advance information concerning the new nation-wide program is enclosed in the form of a news release, a rewrite of which you may be able to have published in your local papers. Please send me a clipping of the story when it is published.

A big job lies ahead for all those connected with the building industry, and financial institutions in providing suitable housing and adequate financing for veterans and other citizens during 1947. I am sure that all members of your organization are ready and willing to help solve the problem in (*city*).

The Federal Housing Administration is going to do everything possible in cooperation with private industry to assist in the Housing Program for 1947 and our (*name of city*) Office will be glad to help in the land planning, design, construction and financing of any rental projects in your community which may be desired.

Very truly yours,

(name)

_____

State Director

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346 INCL. NO. 2 "TO ACCOMPANY SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

FHA MAILING LIST
HOUSING PROGRAM FOR 1947

_____, _____, _____
(CITY) (STATE) (DATE)

CHAMBER OF COMMERCE: _____ _____
(PRESIDENT) (SECRETARY)

_____ _____
(MAYOR) (BUILD. SUPT.)

DAILY NEWSPAPERS:

_____ _____ _____
(NAME OF PAPER) (PUBLISHER) (ADVERTISING MGR.)

_____ _____ _____

FINANCIAL INSTITUTIONS: (USE BACK OF PAGE FOR ADDITIONAL SPACE)

_____ _____ _____

(NAME OF FIRM)	(OFFICIAL)	(TITLE)

BUILDERS AND CONTRACTORS:

(NAME)	(NAME)	(NAME)

ARCHITECTS:

(NAME)	(NAME)	(NAME)

LUMBER DEALERS:

(FIRM)	(OFFICIAL)	(TITLE)

PLUMBING FIRMS:

(FIRM)	(OFFICIAL)	(TITLE)

ELECTRICAL FIRMS:

(FIRM)	(OFFICIAL)	(TITLE)

REAL ESTATE DEALERS:

(NAME)	(NAME)	(NAME)

VETERANS ORGANIZATIONS:

(NAME)	(POST COMMANDER)	(ADJUTANT)

NOTE: Reproduce above and send with letter (Incl. No. 1) to Secretary, Chamber of Commerce, (or other appropriate organization) in all cities with 5000 population or more. Other mailing lists such as, Lumber Dealers, lending institutions, and list of *all builders*, should be utilized.

347 INCL. NO. 3 TO ACCOMPANY "SUGGESTED PATTERN" FOR INDUSTRY MEETINGS

To: The Secretary
Chamber of Commerce, (*City & State*)

SUBJECT: Mailing List

This office is making every effort to be of the utmost service to all builders, dealers and financial institutions in your community. It is our desire to keep them fully informed on the New Housing Program for 1947 and also changes in FHA regulations and procedure.

We recently mailed to you a blank mailing list requesting that it be completed and returned to this office. As to date this list, which will be of great service in arranging our program, has not been returned.

We will appreciate your returning this list at your earliest convenience.

Very truly yours,

(*State or District Director*)

NOTE: The above can be used as a follow-up letter to those cities which do not respond within 10 days to the first letter (Incl. No. 1).

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348 INCL. NO 4 TO ACCOMPANY "SUGGESTED PATTERN" FOR MEETINGS WITH INDUSTRY

(Invitational Letter No. 1—Mail to Rep. in City of Meetings)

(HEADING)

(DATE)

To: Architects, Realtors, Builders, Dealers, Manufacturers and Representatives of Financial Institutions, (City and State)

SUBJECT: FHA Rental Housing Conference

In view of the tremendous need and nation-wide interest in the development of rental housing facilities for Veterans of World War II, as a result of the President's statement regarding the Housing Program for 1947, a conference of

Admitted in evidence
Further [illegible]

[redacted] from the records of the Federal Housing Administration.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Housing Administration to be affixed, on the day and year first above written.

By direction of the Federal Housing Commissioner

Certification Authority

Form [illegible] L8-33 Revised[redacted]

representatives of financial institutions and the building industry will be held at the _____ (PLACE) in _____ (CITY & STATE), _____ (DAY), _____ (DATE) at _____ o'clock.

This conference is being sponsored by the _____ (NAME OF SPONSORING GROUP) and is being held in connection with a State-wide movement to encourage the construction of rental projects under the FHA plan of financing as provided by the Veterans Emergency Housing Act, 1946.

A full explanation of the details of the program as well as an open discussion of the latest changes in FHA regulations and procedure will be conducted by representatives of this office.

There is, in this new Housing Program for 1947, a definite part for you, and we hope that you and your associates will attend this important conference.

Very truly yours,

_____

(*State or District Director*)

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349 INCL. NO. 5 TO ACCOMPANY "SUGGESTED PATTERN FOR MEETINGS WITH INDUSTRY"

(Invitational Letter No. 2—Mail to Rep. in Near-by Towns —4 or 5 Days Before Meeting)

To: Architects, Realtors, Builders, Dealers, Manufacturers and Representatives of Financial Institutions, Vicinity of (City), (State)

SUBJECT: FHA Rental Housing Conference

This office has made arrangements, through the cooperation of the _____ (NAME OF CITY) Chamber of Commerce _____ (OR SPONSORING GROUP), to hold a conference of representatives of the building industry and financial institutions in connection with the New Housing Program for 1947.

The conference will be held at the _____,
(PLACE)
_____, _____, at 8 o'clock, _____
(DAY) (NIGHT) (DATE) (CITY & STATE)
Several representatives of this office including Mr. _____, Assistant State Director, Mr. _____ and the undersigned will
(NAME & TITLE)
be present for the conference and will conduct a full discussion of the Housing Program for 1947, stressing the need for rental units for Veterans of World War II.

Latest changes in procedure in processing applications for rental projects under the FHA plan of financing as provided by the Veterans' Emergency Housing Act, 1946, will be fully explained.

You and your employees are urged to attend this important meeting.

Very truly yours,

_____
(*State or District Director*)

350 INCL. NO. 6 TO ACCOMPANY "SUGGESTED PATTERN" FOR MEETINGS WITH INDUSTRY

(To be mimeographed in each Insuring Office and used at each "Key City" meeting)

CONFERENCE
"RENTAL HOUSING PROGRAM FOR VETERANS"

(Place) _____ (Room)
(CITY & STATE) (DATE)
Sponsored by _____
(NAME OF SPONSORING GROUP)

I. "The Housing Problem in (City)" 10:00 A. M.
By: _____, President,
(NAME)
(Sponsoring Organization)

II. "Rental Housing for Veterans" 10:15 A. M.
By: _____ State (or District)
(NAME) Director
Federal Housing Administration

III. "Introduction of FHA Staff" 10:35 A. M.
By:.....
(NAME OF DIRECTOR)

IV. "Rental Housing Under 603 and Title I" 10:40 A. M.
By:..... Assistant Director
Federal Housing Administration

V. "Section 608—Rental Housing" 11:00 A. M.
By:....., ...
(NAME) (TITLE)
Federal Housing Administration

VI. "Material Outlook for 1947" 11:30 A. M.
By:....., ...
(NAME) (TITLE)
National Housing Agency

VII. "The Veteran's Need" 11:45 A. M.
By:....., Chairman,
(NAME)
State Housing Committee,
American Legion

VIII. Luncheon (Introductions) 12:15 P. M.
By:.....
(NAME OF DIRECTOR)

IX. Panel Discussion and Open Forum
Conducted by.....
(NAME OF DIRECTOR)

....., Assistant Director
....., Chief Underwriter
....., Chief Valuator
....., Chief HC Examiner
....., Chief Const. Examiner
....., NHA Representative
....., Land Plan Consultant
....., Zone Attorney

351 INCLOSURE NO. 7 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

MR. FOLEY'S 5-MINUTE STATEMENT TO BE READ BY DIRECTOR AT ALL MEETINGS

NOTE: This statement will be forwarded under separate cover.

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352 INCL. NO. 8 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

RENTAL HOUSING SECTION 608 SUGGESTED TALK

One of the main purposes of this meeting is to stimulate interest in construction by private industry or rental housing projects for occupancy by Veterans of World War II and their families. The Veteran needs—and wants apartments. In addition to meeting the housing requirements of Veterans, Rental Housing creates steady employment for labor; it affords profitable operations for builders: it provides steady income for sponsors; it gives mortgage lenders sound long-term investments; and it benefits the community as a whole by neighborhood stability.

Veterans are not prepared today to undertake home purchases for the majority can not afford to build or buy on todays market. Most of them are young. Some are still in school and others are in job training and have not established themselves financially. Their ultimate earning levels are not yet determined. Furthermore many of them have not yet selected the community in which they will settle permanently.

Equity investors in rental housing can expect a fair return on their investment during the life of the mortgage and at the end of the amortization period should realize a well-maintained income producing property free and clear of the mortgage debt. All of you know that the greatest assurance of stable earnings in the rental market is the moderately low rental brackets because more families are able to afford these accommodations. They are not so subject to financial hazards as high rental properties and they are not so sensitive to the decline of values caused by speculative over building.

Rental Housing projects need and are now getting Government assistance. With the passage of the Veterans' Emergency Housing Act on May 22, 1946, the most gener-

ous terms in the history of FHA became effective by reviving and revising Title VI of the National Housing Act whereby under Section 608 FHA may insure mortgages on rental housing projects up to 90% of nescessary current cost.

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With an insured mortgage loan up to 90% of necessary current cost, an efficiently operating sponsor-builder may recover through the mortgage substantially all of his cash expenditures.

As an added incentive to the construction of rental housing projects, The Bureau of Internal Revenue is permitting accelerated depreciation for income taxes by suing the declining balance method of accounting. The condition is that the declining balance rate shall not exceed 150% of the straight line rate. So where you have a normal depreciation rate of 2½%, the declining balance rate will be 3¾%.

As a further incentive to sponsor-builders in establishing initial rentals, FHA authorizes an anticipated net return of 6½% with a 7% vacancy allowance. Under Title VI as such, there is no limit to amount of dividend or rate of return.

Attractions to mortgage lenders include, of course, the safeguards of mortgage insurance; substantial return on the investment; and regularity of return of principal over the loan period. Large loans on multi-family structures permit a substantial allotment of investment funds in a single mortgage transaction with economies in both initiating and in servicing the mortgage.

Here is Section 608 in a nutshell: (USE CHARTS)

1. A minimum of 8 units. They may be detached; semi-detached; row houses; or multi-family structures.

2. Maximum amount of mortgage 5 million based upon 90% of necessary current cost Provided:

a. That part of the mortgage attributable to dwelling use does not exceed $1500 per room but this amount may be increased to $1800 by the Commissioner when in his discretion cost levels so require.

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b. The mortgage does not exceed the estimated cost of the completed physical improvements.

3. The project must be an acceptable risk in view of the shortage of housing and occupancy preference must be given to veterans or hardship cases as defined by the Commissioner.

4. The mortgage interest may be whatever is agreed upon by the mortgagor and mortgages but cannot exceed 4%.

5. The mortgage insurance premium is the familiar FHA ½ or 1%.

6. Amortization is by level or delining annuity payments with approximately 27 to 33 years as the maximum term of the mortgage.

7. The commitment from the FHA may be

a. Insure advances during construction

or

b. Insure the mortgage upon completion of the project.

Forms have been simplified, streamlined, and the number required has been materially reduced. Except in the most unusual case the supplementary documents that had to be typed have been eliminated. The printed forms have been reduced in numbers; have been simplified and are complete and self-explanatory.

(Use Charts in Explaining Illustrative Case)

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355 Incl. No. 9 To Accompany "Suggested Pattern for Industry Meetings"

SUGGESTION FOR CONDUCT OF PANEL DISCUSSION "KEY-CITY" MEETINGS

The panel discussion will be conducted by the Chairman (Director). It will consist of a panel or board of four, five, or six Section chiefs or specialists, the Chief Underwriter, and Assistant Director.

The Chairman will first open the meeting in the customary manner and introduce each member of the panel. He will then call on each panel member for a short five or six minute talk on a previously assigned subject preferably in the section chiefs', Underwriter's or specialists' field.

Following the specialized talks, the meeting will become an open forum and questions will be entertained from the audience. As each question is presented, the Chairman

will request a panel member to answer the question presented. In this phase of the operation, he should assign the question to the person best suited to render a comprehensive answer.

The open forum period should last at least an hour.

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356 INCL. NO. 10 TO ACCOMPANY "SUGGESTED PATTERN FOR MEETINGS WITH INDUSTRY"

REPORT OF INTERVIEW
RENTAL HOUSING—SECTION 608

Name of Sponsor: ....., ...
(BUSINESS)

....., ..., ...
(ADDRESS) (CITY) (PHONE)

Site Location: ....., ...
(CITY)

Number of Units Contemplated: Two-BR .....:
One-BR ..... Eff. Units: .....:
Total Units: .....

Type of Buildings: .....

.....

Mortgage: ....., ...
(CITY)

Architect: ....., ...
(CITY)

Remarks: .....

.....

.....

.....

NOTE: This Form To Be Reproduced In Each Insuring Office and Used In Connection With Industry Meetings and All Interviews Conducted By FHA Personnel With Interested Sponsors of Rental Housing Projects.

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(DATE) (FHA INTERVIEWER)

357 INCL. NO. 11 TO ACCOMPANY "SUGGESTED PATTERN FOR MEETINGS WITH INDUSTRY"

AIR MAIL

MEMORANDUM January 7, 1947.

TO: All Regional Expediters

FROM: Gunnar Mykland, Acting Deputy Expediter (Field Operations)

SUBJECT: Rental Housing Program For 1957

The purpose of this memorandum is to outline current responsibilities for the rental housing program for 1947 and to set forth specific instructions for action by the Expediter's field staff in connection with the industry meetings to be called by FHA. Additional instructions regarding a community action program in the rental field will be sent in the near future.

Responsibilities of the Expediter's Field Staff and FHA

Generally speaking, action by the Expediter's field staff will encompass work with communities. The Expediter's staff will be responsible for developing and maintaining community interest in and appreciation of the need for rental housing. Locality Expediters, assisted by regional staff specialists, will be expected to create in each community an atmosphere such that when municipal assistance is needed to further the rental housing program, such assistance will be readily available. For example, concentrated and sustained work will be done with Mayors' Emergency Housing Committees and other appropriate community bodies on the problems of necessary utility extensions, rezoning, planning for community facilities, etc. In addition, after projects are under construction the Expediter's field staff will give any assistance possible to builders in solving their materials problems.

Generally speaking, the FHA will be responsible for *all* contacts with the producers of rental housing. All persons known to be interested in producing rental housing are to be referred to the appropriate FHA office at the earliest opportunity. The FHA is now augmenting its rental housing staff. It is expected that the augmented

staff will be adequate not only to arrange initial industry meetings on rental housing in all communities of 10,000 population and over but will be able to provide necessary follow-up service as well. Therefore, if any information regarding prospective producers of rental housing comes to the attention of Locality Expediters, such information should be referred to the FHA so that the necessary follow-up can be instituted immediately. The FHA is now instituting a detailed reporting system which will insure that adequate follow-up will be given to any case in which so much as an interest in rental housing has been expressed.

Meeting with Industry

The first major step in the implementation of the rental housing program for 1947 will consist of a series of meetings with the industry which will be called by the FHA. These meetings will be started by the middle of this month and will continue until meetings have been held in all cities of 10,000 population and over. A copy of the detailed instructions regarding the organization and conduct of these meetings is attached hereto for your information. These meetings are not to be general public meetings for the purpose of discussing rental housing. They are designed as trade meetings for the benefit of real estate groups, lending institutions, builders, materials men, appropriate local officials, and representatives of veterans organizations. In most communities it is proposed to ask the local Chamber of Commerce to sponsor the meetings but in com-
358 munities where a particularly outstanding Mayor's Emergency Housing Committee is in operation the FHA may decide to ask that organization to sponsor or co-sponsor the meeting.

It should be clearly understood at the outset that the industry meetings are the primary responsibility of the FHA. Participation of the Expediter's field staff in the meetings is outlined as follows:

1. A representative of the Regional Expediter's staff (generally the Locality Expediter) will be called upon to deliver a 15 minute speech on the general materials outlook. The text of this speech will be prepared by the Office of Materials Supply in Washington and will be delivered as written. A few simple and effective

wall charts on the production of critical building materials can be prepared and distributed in time to be used in connection with these talks.

2. The representative of the Regional Expediter's staff will also participate in the afternoon panel discussion when he will be available to answer questions on materials production, utilities problems, zoning ordinances, etc.

3. The regional information staff will be available to the various FHA directors on their request to handle press releases in connection with the meetings. Basic publicity material will be sent from the FHA office in Washington direct to the various district offices. The FHA director in his discretion may call for assistance nouncements of the meetings. In cases where this assistance is requested, the regional information staff will be expected to give full cooperation and work in accordance with the instructions of the FHA director.

General Comments

There is attached hereto for your information a copy of Commissioner Foley's instructions of January 2, 1947 to all field offices on the rental housing program. As Mr. Foley has pointed out rental housing is the keynote for our housing program in 1947. I know as always we can count on you to extend full and complete cooperation to the FHA in this the first part of the program of stimulating a record volume of rental housing this year.

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359 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 1
For Immediate Release

New facilities and an expanded staff are being provided in the _____ office of the Federal Housing Administration to carry out the program of rental housing for veterans, State (District) Director _____ announced today.

Mr. _____ said that FHA Commissioner Raymond M. Foley had placed on State and District Directors the responsibility of securing full cooperation of all branches of industry within their territories to accomplish

the objective of the program outlined recently by President Truman, which is to encourage larger production of rental dwellings for veterans.

Under the program, three broad avenues of approach will be used for obtaining additional rental units: (1) conversion of existing structures which will produce the quickest action at lowest cost and probably lowest rentals; (2) construction of more two, three, and four-family units, considered the next speediest method and one which will broaden opportunities for builders and investors; (3) production of more large-scale rental structures.

As an immediate measure to promulgate FHA policies and to obtain the cooperation of industry and lending institutions, Mr. _____ said, arrangements are being made to hold a general meeting for the entire State (District), to be followed by local meetings in all communities throughout the State.

Among the policy and procedural changes made by FHA to encourage production of more rental housing for veterans are the following:

Minimum property requirements for multi-family units, previously in effect throughout the country, will hereafter be used as a guide, and the local FHA staff may accept alternates that will produce structurally sound and well designed projects with continuing rental appeal.

360 FHA's cost estimation system has been revised and various simplifications have been made which will sharply reduce FHA processing time in rental projects seeking insured financing.

Application forms, preliminary drawings, and exhibits are being simplified, and certain other procedures are being discontinued or revised to save time.

In cooperation with lending institutions, FHA will give ready consideration in the future to readjustment of mortgage terms in order to enable projects built under present emergency conditions to maintain their competitive market position; this will involve re-writing of mortgages in cases of decreased earnings.

Rehabilitation of existing structures will be encouraged to produce additional family units, and construction of a large number of rental units of two, three, and four-family structures will be encouraged.

Particular attention will be paid by the local FHA office to development of rental investment opportunities for non-veteran investors who may be interested in owning rental projects of two to four units, occupying one themselves and renting the others to veterans. Also it will survey local situations to determine what can be done to assure expanded conversion and remodeling of existing structures to provide more rental units.

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January 8, 1947

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361 INCLOSURE No. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 2
To be mailed with letter entitled "Housing Program for 1947" to Secretary of Chamber of Commerce or other appropriate group for their issuance to the press.

New hope for veterans of World War II and their families looking for a place to live in _____(city) was held out today by _____, (Secretary of the Chamber of Commerce), in discussing the newly announced national rental housing program.

"I have been informed by the Federal Housing Administration that all its forces, both nationally and locally, are being mobilized to help private industry produce the largest possible volume of new dwelling units for rent to veterans and their families in the shortest possible time," Mr. _____ said. "This is being done in response to President Truman's call for a vigorous housing program in 1947 to provide shelter for veterans.

"The (Chamber of Commerce) in this city, and those in other larger communities of the State, are working in cooperation with State (District) FHA Director _____ and his entire staff in arranging Rental Housing Conferences. They will be held to acquaint all those directly interested in producing or financing homes and housing projects in recent changes of policy and procedures made by FHA Commissioner Raymond M. Foley to encourage production of more rental housing."

Announcement of the time and place of the meeting to be held in this city is expected to be made within a few days. Among those who will be invited to attend are

builders, realtors, architects, subdivision developers, investors, and officials of financial institutions and labor and veteran organizations.

The way has been cleared to make 1947 the greatest home building year in the city's history, Mr. _____ said, by the relaxation of building and materials controls and by steps taken by FHA to facilitate the planning, construction, and financing of individual homes and rental housing projects for rent.

362 It was pointed out that the old priorities system, with a price ceiling on all new housing, had been suplanted by a new "Permit System" under which any citizen can get authorization to build a home, limited to 1,500 square feet of floor space and fixtures for one bathroom, for his own occupancy—provided in event of subsequent sale or rent, preference will be given to veterans of World War II. Or he can get authorization to build any number of dwelling units, from a two-family house to a multi-family housing project, for rent or sale to veterans and occupy one unit with his own family.

Houses for one to four families can be financed with mortgage loans running for 25 years and for up to 90% of "necessary current cost", insured by FHA under Title VI of the National Housing Act. They bear 4% interest, plus ½ of 1% FHA mortgage insurance. Housing projects of 8 or more units can be financed with 90% FHA-insured mortgages bearing the same or lower interest and for longer terms.

Three broad avenues of approach will be used in the program for obtaining additional rental units for veterans: (1) conversion of existing structures which will produce the quickest action at lowest cost and probably lowest rentals, which can be financed with loans insured by FHA under Title I of the National Housing Act (2) construction of more two, three, and four-family units, considered the next speediest method and one which will broaden opportunities for builders and investors, which can be financed with FHA-insured mortgages under Section 603, Title VI; (3) production of more large-scale rental structures, which can be financed under Section 608, Title VI.

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363 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 3
For release as meetings are scheduled

A partial schedule of Rental Housing Conferences to be held in all the larger communities of _____ (State or District) under auspices of local Chambers of Commerce and other civic bodies in cooperation with the Federal Housing Administration was announced today by _____, State (District) Director, at the _____ Office of FHA.

These meetings will follow the statewide conference (to be) held in _____ (city) on _____ date. They are part of a broad State and National effort to enlist builders, realtors, materials dealers, architects, financial institutions, labor organizations, and veterans organizations in President Truman's housing program for 1947 and at the meetings the changes made by FHA in its policies and procedures to facilitate production of rental housing for veterans of World War II will be outlined.

Mr. _____ (Director) will attend these meetings with a large part of his staff. They will explain various phases of the Rental Housing Program in detail and tell of the opportunities for builders and investors to participate in the program with the aid of FHA.

The first of the local meetings will be held in _____ _____ (city) on _____ (date) and will be under the sponsorship of _____ (organization). Other meetings already scheduled include the following:

(List cities, dates, and sponsoring organizations.)

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364 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 4
Key City Conference
For appropriate release
with picture of Asst. Director

Plans for a Rental Housing Conference for _____ _____ (State or District) to encourage production of new dwelling units for rent to World War II veterans and their families were discussed today by heads of various

state organizations connected with home building and financing, with _____, Assistant State (District) Director, Federal Housing Administration, at _____ (city).

It was decided, according to Mr. _____, to hold a meeting at _____ (city) of the State (District) representatives of builders, realtors, materials dealers, architects, financial institutions, labor organizations, and veterans organizations to outline details of President Truman's housing program for 1947 and the changes made by FHA in its efforts to facilitate rental housing projects for veterans of World War II.

The State (District) meeting, which is part of a broad national program, will be held at the _____. It will be an all-day affair with morning and afternoon sessions and a luncheon. The State (District) FHA Director and most of his staff will attend.

"As President Truman said in his announcement recently, the main point of emphasis for 1947 is rental housing," Mr. _____ explained. "Within the total number of homes to be built, it is of major importance that a maximum number of rental units be provided, with veterans being given preference in occupancy.

"To increase the proportion of rental units, the President said that all availabe means must be used—new construction, conversion and rehabilitation, and re-use. The Rental Housing Conference to be held here will explore means of providing new dwelling units for rent, with the aid of new facilities provided by FHA under Title VI of the National Housing Act."

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365 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 5
Key City Conference
For release just before meeting

Full information to aid private industry in providing rental housing for World War II veterans and their families will be outlined today (tomorrow) at an all-day Rental Housing Conference to be held at the _____ (place) in _____ (city), according to _____ (sponsoring organization).

Attending the meeting will be representatives of builders, realtors, materials dealers, architects, financial institutions, labor organizations, and veterans' groups, together with State (District) Director _____ of the Federal Housing Administration and a large part of his staff from the local insuring office, and a representative from the regional office of the National Housing Agency.

The main purpose of this Statewide (District-wide) conference is to outline recent changes in FHA procedures and policies which have been made in order to encourage larger production of rental dwellings for veterans as part of President Truman's housing program for 1947. Local meetings will be held in the immediate future in all the larger cities of the State (District).

Discussions at the conference will concentrate on the new opportunities for producing rental housing projects offered by the Federal Housing Administration under new policies announced by Raymond M. Foley, Commissioner of FHA, who recently was also made Administrator of the National Housing Agency.

There will be a morning session at _____ A. M., followed by a luncheon at _____ P. M., and an afternoon session at _____ P. M.

Proceedings will be opened by _____. He will read a letter on the Rental Housing Program from FHA Commissioner Foley and will introduce State (District) FHA Director _____, who will
366 outline the three broad phases to be discussed in detail by Chief Underwriter _____ and other members of his staff.

These three avenues of approach which will be used for obtaining additional rental units are:

1. Conversion of existing structures which will produce the quickest action at lowest cost and probably at lowest rentals, under Title I of the National Housing Act.

2. Construction of more two, three, and four-family units under Section 603, Title VI. This is considered the next speediest method and one which will broaden opportunities for builders and investors.

3. Production of more large-scale rental structures under Section 608, Title VI.

A representative of the National Housing Agency will discuss the outlook for materials in 1947. The housing needs of veterans will be discussed by _____. The afternoon session will be devoted to panel discussion.

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367 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 6
For release to Sunday papers in advance of conference with picture of State Director; through Chamber of Commerce or other group

A conference on rental housing for veterans will be held _____ (date) _____ (place) at an all day meeting where builders, realtors, materials dealers, architects, financial institutions, and veterans, and labor organization representatives will be able to exchange views and get specific information.

The conference will start with an opening talk by _____ (mayor or other official) at 10:00 A. M. o'clock. A message from Raymond M. Foley, FHA Commissioner, will be read, outlining the salient points of the rental housing program for veterans.

Key members of the FHA staff in the state will be present and will be introduced by the chairman of the conference.

Since an important part of the rental housing program has to do with remodeling and conversion of existing buildings to provide added dwelling units, this subject will come up for discussion first. Details of monthly payment financing under Title I of the National Housing Act, will be explained by _____. These loans are made by qualified financial institutions and insured by the Federal Housing Administration.

Large scale rental housing for veterans will be discussed by _____ of the Underwriting staff of the FHA. He will present charts and explain the Federal Housing Administration procedural changes which have been made to speed up approval of applications for insured mortgage financing.

"The Outlook for Materials in 1947" will be the subject of the talk by _____, National Housing

Agency regional representative. The housing needs of the veterans will be discussed by _____, (State housing chairman of American Legion or other veterans' speaker).

368 At the luncheon, sponsors of the conference have not scheduled speakers. It is planned, however, to have officials representing various organizations present introduced at this time.

The afternoon will be devoted entirely to panel discussions. Specific subjects will be discussed in each of the groups and persons attending the conference may select the group subject which is to meet interest. Meeting with each of the groups will be one representative of the staff of the Federal Housing Administration Director.

"This conference and the subsequent meetings which are planned are intended to initiate the greatest combined effort yet made to provide rental housing", declared _____, FHA State Director. "It is plainly our duty to produce more rental housing this year than ever before. To do so means utilizing every available means. There is need for all kinds of projects from the simple remodeling job which will result in a small apartment to the large scale projects which will house hundreds of veterans' families."

New assignments of personnel are being made to each FHA office, with the major responsibility of encouraging rental housing projects.

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369 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 7
Local meetings after Key City
For release about one week before meeting
with picture of Assistant Director

Plans for a Rental Housing Conference to be held in _____ to encourage the production of new dwelling units for rent to World War II veterans and their families were discussed today by _____, (Secretary of the Chamber of Commerce), with _____, Assistant State (District) Director, Federal Housing Administration.

It was decided, according to Mr. _____, to hold a meeting of builders, realtors, materials dealers, and representatives of financial institutions to outline details of President Truman's housing program for 1947 and the changes made by FHA in its efforts to facilitate rental housing projects for veterans. Representatives of veterans' organizations also will be invited.

The local meeting which is part of a broad state and national program will be held at _____, (time) _____ (day), at the _____ (place). Several representatives of the FHA State Office at _____ will attend, including State Director _____ and Chief Underwriter _____.

"As President Truman said in his announcement recently, the main point of emphasis for 1947 is rental housing," Mr. _____ explained. "Within the total number of homes to be built, it is of major importance that a maximum number of rental units be provided, with veterans being given preference in occupancy.

"To increase the proportion of rental units, the President said that all available means must be used—new construction, conversion and rehabilitation, and re-use. The Rental Housing Conference to be held here will explore means of providing new dwelling units for rent, with the aid of new facilities provided by FHA under Title VI of the National Housing Act."

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370 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 8
Local meetings after Key City
For release just before meeting

Full information covering the program of the Federal Housing Administration to aid private industry in providing rental housing for World War II veterans and their families will be outlined tonight (tomorrow night) at a Rental Housing Conference at the _____ (place), according to _____, Secretary, Chamber of Commerce.

Mr. _____, State Director of FHA, arrived last night for the purpose of completing final arrangements for the conference. He said other repre-

sentatives of the FHA office would arrive late today to take part in the meeting.

The main purpose of the meeting is to outline to local representatives of the building industry and financial institutions recent changes in FHA procedures and policies which have been made to encourage larger production of rental dwellings for veterans as part of President Truman's housing program for 1947. Realtors, contractors, operative builders, materials dealers, and officials of financial institutions from nearby towns have also been invited, together with representatives of labor and veteran organizations.

Discussions at the conference will concentrate on the new opportunities for producing rental housing projects offered by the Federal Housing Administration in the new program announced by Raymond M. Foley, Commissioner of FHA, who recently was also made Administrator of the National Housing Agency.

Under the program, as outlined by Mr. Foley, three broad avenues of approach will be used for obtaining additional rental units:

1. Conversion of existing structures which will produce the quickest action at lowest cost and probably at lowest rentals.

2. Construction of more two, three, and four-family units, considered the next speediest method and one which will broaden opportunities for builders and investors.

371 3. Production of more large-scale rental structures.

All three methods will be discussed fully at tonight's conference, it was said.

A representative of the National Housing Agency will discuss the outlook for materials in 1947. The housing needs of veterans will be discussed by _____ _____. The afternoon session will be devoted to panel discussion.

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372 INCLOSURE NO. 12 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

Press Release No. 9
For release as needed after
Key City and local meetings

Pledges of cooperation in the "vigorous housing program" for 1947 recently stressed by President Truman to provide new homes for rent to veterans were given by leaders of industry, finance, labor, and veterans' organizations yesterday at a Rental Housing Conference held in _____ at _____.

Plans were made for holding similar conferences in the immediate future in every large community in the State (District) in order to acquaint builders, realtors, materials dealers, architects, financial institutions, labor organizations, and veterans' organizations with details of the program and to enlist their direct support.

Sessions were held both morning and afternoon (or in evening), with a luncheon in between. They were opened by _____, who explained President Truman's general program and read a letter from Raymond M. Foley, Commissioner of FHA and Administrator of the National Housing Agency. In this letter Mr. Foley said:

"Never before has such a housing challenge been placed before private enterprise. Never before in the history of the Federal Housing Administration has there been so great a responsibility placed upon us. This responsibility will be discharged to the limit of our ability."

State (District) FHA Director _____ was then introduced. He said that the local insuring office was adding to its facilities and personnel in order to carry out its share of the rental program. He then explained the policy and procedural changes made by FHA, with particular emphasis on several recent financial changes affecting rental housing.

The three broad avenues of approach to be used for obtaining additional rental units for veterans under FHA's program were outlined: They were: (1) conversion of existing structures (Under Title I, National Housing Act) which will produce the quickest action at lowest cost and probably at lowest rentals; (2) construction of more
373 two, three and four-family units (Under Section 603, Title VI), considered the next speediest method and

one which will broaden opportunities for builders and investors; (3) production of more large-scale rental structures (under Section 608, Title VI.)

Prospects for adequate supplies of building materials for the program were discussed by _____ of the Regional Office of the National Housing Agency. Also explanation was given of the new system of authorizing residential construction, which supplanted the old priorities system and which is administered by the FHA offices. Among the policy and procedural changes made by FHA to further the Rental Housing Program, which were discussed in detail at the meeting were:

The local FHA office will survey local situations throughout its territory to determine what can be done to assure expanded conversion and remodeling of existing structures to provide more rental units. Rehabilitation of large apartment buildings, hotels, or commercial structures will be encouraged to produce added family units.

The local FHA office will develop rental investment opportunities for non-veteran investors who may be interested in owning rental projects of two to four units, occupying one themselves and renting the others to veterans.

Every effort also will be made by the local FHA office to interest investors and builders in large-scale rental housing projects. Most of the recent changes affect large-scale housing produced under the FHA program.

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374 INCL. NO. 13 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

SUGGESTED TITLE I SPEECH TO BE DELIVERED BY A REPRESENTATIVE OF THE FEDERAL HOUSING ADMINISTRATION BEFORE INDUSTRY GROUP MEETINGS

Mr. Chairman, (Ladies and) Gentlemen: It is a pleasure for me to be here today and to take a part in the discussions pertaining to our mutual objectives. I think that I speak for all of us when I state that new dwelling constructions and additional living accommodations created by the conversion of existing structures can be provided for our citizens through the concerted effort of private

enterprise. While this program today is primarily for the purpose of acquainting you with the methods by which rental housing can be accomplished under Title VI, as well as Title II, of the National Housing Act, it was considered advisable to inform you of the facilities available under Title I so that we could have a well-rounded program.

Probably a brief history of Title I may be of some interest. The National Housing Act was signed by the President in June, 1934 and Title I was the first part of the Act to become operative. At that time, you will recall, we were in the depths of a tremendous depression and perhaps the outstanding goal of Title I was to assist in returning people to work. A large promotional campaign was therefore launched to get the people of the nation to modernize, repair and rehabilitate their properties. Lending institutions were insured against loss for the loans which they made and there was no charge assessed to them for this insurance. In other words, it was simply a subsidy by the Federal Government and the achievements which were obtained justified this subsidization. This first cycle of operations ran from 1934 to 1939.

The second period of operations began in 1939 and it was felt that Title I should be given a greater degree of stability and permanency. We suggested to Congress that we be allowed to charge a small insurance premium for the risk of insuring lending institutions against loss which might be sustained. This recommendation was approved by Congress and gradually the Title I program took on a new philosophy. We felt that Title I should be self-sustaining and have continually advanced the policy that prudent lending practices should be followed in the handling of loans. Through the services of our local offices and by personal visits with large numbers of lending institutions we have stressed the fact that lenders should exercise the same prudent practices in the handling of Title I loans to which they adhere in their other lending activities.

The third, and by far the most important period of our operations, began shortly after VJ Day in 1945. It was recognized that deterioration and obsolescence had been going on during the four war years. The existing supply of housing must be kept habitable and the Federal Hous-

ing Administration, as a part of its over-all program, recommends that property owners make those repairs and improvements necessary to maintain their structures in sound working condition. Loans for such purposes, available through private lending institutions holding Contracts of Insurance with this Administration, may be made in amounts up to $2500 and may have maturities as long as three years.

At this time we are placing particular emphasis on that part of our program which calls for the conversion of existing structures to provide additional living units. We believe that through this medium a maximum number of units can be provided within the shortest possible time. Loans for projects of this type are available in amounts up to $5000 with maturities as long as seven years. A number of projects suitable for conversion are suggested. An unused attic can be converted into living quarters for an entire family. A new room may be added to the first floor. This may be all that is needed to house another family. A new room can be added to the first and second floors. This is a good way to convert from a one family to a two family house. An old residence can be converted to increase the number of families it can house. The number of apartments in a multi-family building can be increased by reducing the size of present units. Also,
376 business properties or warehouses can be converted into multi-family dwellings.

Under the Title I program approved lending institutions may also make loans in amounts up to $3000 for the erection of commercial structures such as filling stations, tourist cottages, and way-side stands or for the erection of non-residential agricultural structures such as barnes, silos and other service buildings on the farm.

There are two basic types of loans. In one, the borrower makes application to the lending institution of his choice and when the loan has been approved he makes the necessary arrangements and directly pays his dealer or contractor for the cost of his materials and services. In the second, the dealer originated loan, the contractor makes an estimate of the cost of improvements to the customer, obtains a Credit Application from the applicant borrower and refers it to an approved lending institution. If the lender finds the credit to be satisfactory, the dealer is noti-

fied and he proceeds to do the work. Upon completion, both the borrower and the dealer execute Completion Certificates which are presented to the lending institution and the dealer is paid off in cash by the lender.

Title I affords the dealer an easy sales tool and by receiving payment in full at the completion of each job he is relieved of the burden of carrying accounts receivable on his books with the additional cost involved and the possibility of certain losses.

To you lenders who are present today we think that Title I offers a number of advantages. It seems logical to conclude that Congress, in providing such a wonderful system under the National Housing Act for individuals to build or buy homes, should also have provided a means by which those same people could maintain and improve their homes throughout the years. After you have started your customer on the way to home ownership you should be in a position to render ful life service to your mortgagors.

There are many reasons why you should make FHA
377 Title I loans. The interest rate is one of the most profitable of any investment you could make. You are strengthening existing mortgages and such loans help you to retain present customers as well as to make new customers.

There are many thousands of homes in the State of _____, that are badly in need of repairs which have not been performed because of shortages of materials, labor and other wartime restrictions. There are also thousands of structures such as old, large, outmoded dwellings, office buildings, warehouses and other types that are suitable for conversion purposes to provide additional dwelling units.

It has been almost a year and a half since we laid aside the implements of war and destruction and took up the tools of peace and construction. The task ahead is a great one but you members of the building and allied industries and lenders have much in common with the Federal Housing Administration in seeing that it is accomplished. Through our mutual cooperation I am confident that it can be done.

378 INCL. NO. 14 TO ACCOMPANY "SUGGESTED PATTERN FOR INDUSTRY MEETINGS"

OUTLINE OF PROCEDURE IN 608 RENTAL HOUSING LOANS

I. General Requirements for Eligibility

A. Amount of the mortgage may not exceed $5,000,000.

B. The maximum insurable mortgage will be determined by selecting the lowest of the following amounts:

(1) The FHA estimate of cost of the completed physical improvements, including carrying charges, and financing, but exclusive of land, offsite public utilities and streets, and organization and legal expense.

(2) 90% of the FHA estimate of total replacement cost of the property (including the land).

(3) An amount which will require debt service (including special assessments and ground rents) not in excess of 91% of the FHA estimate of net income. The amortization rate for the first year included in debt service must not be less than 1½% of the original mortgage amount.

(4) An amount which will not exceed $1500 per room attributable to dwelling use, or such increased limit as the Commissioner may approve for particular areas. But in no event to exceed $1800.

Room count—For purposes of uniformity the Administration has established the following method of counting the number of rooms, which must be followed:

(a) Living and bedrooms shall count as one whole room each.

(b) Kitchens, the area of which is not less than 60 square feet, shall count as one room each, provided they are separate from all other rooms by a complete partition with a door.

(c) Kitchens less than 60 square feet, but not less than 50 square feet in area, which are separated from other rooms by a complete partition with a door, shall count as one-half room.

379 (d) Strip kitchens, located in a room, a recess off a room, or in a closet space with doors, shall not be assigned any room count. Except in certain types of efficiency units.

(e) Dining alcoves, not less than 45 square feet in area, separated from the kitchen by a partition and a door and having outside light and ventilation shall count as one-half room.

(f) Dining rooms not less than 110 square feet in area shall count as one room each.

(g) Bathrooms shall not be included in the room count, nor interior foyers whether intended for dining or not.

(5) The amount of mortgage loan applied for by the sponsors.

C. Preference or priority of opportunity to occupy must be given to Veterans of World War II and their immediate families.

D. The interest rate shall not exceed 4%.

E. The term of the loan may be approximately 32 years.

F. The land must be held in fee simple or on the interest of the lessee under a lease for not less than 99 years which is renewable or under a lease having a period of not less than 50 years to run from the date of the mortgage.

G. The mortgage must cover new housing accommodations designed principally for residential use conforming to standards outlined below and consisting of not less than eight rentable dwelling units on one site. Such improvements must not violate any zoning or deed restrictions applicable and must conform with all Government regulations covering the building.

H. Maximum lot coverage—

(1) Lot coverage shall not exceed 35% for an interior plot and 45% for a corner plot in a Type A area. (A Type A area is one with more than 25 families per net acre.)

(2) Lot coverage shall not exceed 25% in Type B areas (A Type B area is one having fewer than 25 families per net acre).

380 II. Procedure Prior to Application

A. It is suggested that the applicant call upon the State Director of the Federal Housing Administration, or his representative, at the FHA Office, (address and city). It is suggested that the applicant telephone in advance in order that the Director of his representative can be certain to be available at the desired time.

B. The State Director or his representative will desire to discuss with the project sponsor the following matters:

(1) The proposed location of the project.—Information concerning the following items would be helpful:

(a) Availability of utilities
(b) Street improvements
(c) Taxes and special assessments
(d) Zoning ordinances
(e) Deed restrictions
(f) Public transportation
(g) Legal description
(h) Distance from churches; schools; business, industrial, commercial, and recreational centers. (It is suggested that a small city map be marked showing the locations involved).
(i) It is suggested that a photograph of the proposed site be available.

(2) The proposed rental range.

(3) The general plan of the building improvements, (size, type, and general arrangement).

At this point the applicant will be furnished with a copy of "FHA Minimum Property Requirements for Properties of Three Or More Units", and a general planning conference between the sponsor's architect and the FHA Construction Section will be arranged.

381 (4) The proposed organization and financial structure.—Information concerning the assets (rent, cash, or services) should be available at this time. The requirements pertaining to the sponsor are as follows:

(a) The sponsors (and the contractor, if named at this stage of processing) must be of good reputation and must have credit standings reflecting a satisfactory attitude toward obligations and ability to manage affairs.

(b) It must appear that the sponsors collectively have the ability to successfully organize, construct, and manage the project. This should generally be demonstrated from the past experience of the individual sponsors. The insurance of construction advances makes it particularly important to determine that the contractor has the ability to build the proposed structures and can obtain satisfactory assurance of completion, usually in the form of a performance bond.

(c) There must be reasonable assurance that the sponsors are financially able to provide assets which, together

with the mortgage loan proceeds, will be sufficient to meet all costs of completing the project and to provide working capital.

(5) At the conclusion of this conference, the FHA State Director or his representative will be in a position to indicate tentatively whether the project is considered feasible. If the project appears impossible, the sponsor will be so advised at this point in order that additional expense need not be incurred.

C. If the project appears feasible, the sponsor will be furnished a copy of FHA Form 2013W, "Application for Mortgage Insurance". The applicant should file application on this form, through his mortgagee, with the Office of the Federal Housing Administration.

NOTE: The above may be reproduced in each Insuring Office and used to make up "Kits" to be furnished interested sponsors of rental projects.

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382 STATEMENT BY THE PRESIDENT

December 14, 1946

In my recent statement on housing I made it clear that there would be no major modification in the objective of rapidly and adequately housing our veterans. At the same time I emphasized the great need to stimulate rental housing for veterans and pointed out that the overall program must be within the framework of the government's announced policy of relaxing controls.

I am determined that a vigorous housing program will continue to be carried out in 1947.

The techniques we will use are those that will work today. I am interested in results and I am convinced that this 1947 program will produce results.

The main point of emphasis for 1947 is rental housing. Within the total number of homes to be built, it is of major importance that a maximum number of rental units be provided. We are planning financing and other aids that will encourage builders to produce units for rent.

In 1947 we will continue, at least for some months, the basic limitation order on non-residential construction and the allocation of certain raw materials for the production of housing items. But these will be relaxed or dropped as rapidly as the situation permits. The priority rating system for builders and individuals is being discontinued.

We are also planning to carry through on certain special programs already underway:—apprentice training; technical research; and above all steps to reduce permanently the cost of housing, most notably by aiding manufacturers of new materials and factory-built homes.

THE PROGRAM

Restrictions on Non-Residential Construction

The completion of homes must continue on an increasing scale. The most important governmental order which enables us to accomplish this purpose is the order limiting non-residential construction. This must be continued. However, there is increasing need for schools and stores and other community facilities in connection with new housing developments, and for certain essential industrial and research projects. Fortunately, we can safely permit some increase in non-housing construction because of the greatly increased volume of building materials. As the supply improves, the order can be relaxed to allow more non-residential construction.

Permission to Build Homes

During 1946, a large volume of dwelling units has been put under construction and the completion rate of these homes has been increasing from month to month. Nevertheless, the veterans' need remains extremely urgent and we recognize this by continuing to give veterans preference for every dwelling unit constructed for sale or rent.

383 However, from now on any person who wishes to build a home for his personal occupancy will be permitted to do so, subject to certain restrictions. This will increase the over-all housing supply and, in many instances, make additional homes available for veterans.

The construction of housing will be authorized by federal permits. The major restrictions which will be imposed are:

1. The proposed dwelling must be designed for year-round occupancy.
2. The total floor area will be restricted.
3. In the case of rental housing projects, maximum rents, excluding charges for services, will be set at a project aver-

age not exceeding $80 per unit. Rentals will also be established for individual houses built for rental purposes.

The permit system will be simple. It will not be necessary to have sales prices set, or to meet the standards and inspection requirements of the present priority system.

Priorities

Priority ratings were necessary in 1946 while building materials were in critically short supply, but the increasing of building materials coupled with the limitation on non-residential construction and a continued postponement of luxury-type housing make the priority system no longer necessary. Outstanding priorities with their attendant obligations will be honored, but the issuance of any additional priorities to builders or manufacturers of homes will be discontinued as soon as the permit system gets into operation.

Allocation of Materials

The production of critical building materials will require the continued allocation of a few raw materials during the first quarter of 1947. If present high levels of production are maintained, it should be possible to discontinue raw materials allocation at that time.

Premium Payments

During 1946, premium payments have been successfully used for increasing the production of many building materials. However, present conditions require a critical review of each of these plans and the continuation of only those which will result in substantial benefits to housing.

Guaranteed Markets

The guaranteed market plans for industrial and prefabricated housing and for new types of materials will be continued. The Reconstruction Finance Corporation will continue to assist manufacturers of such housing and the producers of such materials by financial aid when it is warranted.

384 *Surplus Property*

For the past few months surplus property has been made available for housing purposes in increasing

amounts. Building machinery and building materials and supplies will continue to go to home builders. The demolition program at old Army camps and other installations, another useful source of materials, will also go forward. During the next few months, many surplus buildings will be sold for use at other sites. I am also asking the War Assets Administrator to establish procedures that will facilitate the sale of land and buildings together.

Export Controls

Export controls on building materials will be continued until the supply situation warrants their discontinuance. For the present we must limit the quantity of critical materials that can be sent abroad.

Rental Housing

More family units must be made available for rent to veterans. They should not be compelled to buy in order to get shelter. To increase the proportion of rental units, we intend to use all available means—new construction, conversion and rehabilitation, and re-use. The great bulk of this task will fall upon private enterprise. We are aiding private enterprise by simplifying and reducing various priority controls and by the measures taken to increase availability of materials. We also plan a number of financial measures that will encourage the construction of rental housing.

Insured Mortgage Financing

To provide assurance of continued insured mortgage financing to builders who are planning rental housing, I am making available to the Federal Housing Administration the second billion dollars of Title VI insurance authorization provided for in the Patman Act. This is to be used primarily for rental housing, together with the largest possible share of the first billion dollars directly authorized by Congress. Congress will be asked to advance the termination date of Title VI insured financing authority at least for rental housing, for a period sufficient to accomplish this objective.

Assistance for Rental Projects

The qualified FHA personnel freed from duties involved in controls now being removed or relaxed, will be made available to help private sponsors plan rental projects and to expedite processing for insured financing commitments.

The FHA is simplifying procedures and broadening eligibility standards which will expand the field of its operation in rental housing. More types of rental housing will now be eligible for FHA financing.

To remove uncertainty over adequacy of insured financing commitments for rental projects, the FHA will develop a procedure for review and amendment of commitments issued in advance of construction.

385 To reduce monthly payments and to make possible lower rents, the FHA will extend the term of amortization in its Title VI rental housing commitments beyond the usual 28 years, the amount of extension to be appropriate for the project proposed.

To guard against the possibility of lesser earnings of housing projects after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subseqeunt periods in the life of the project.

The National Housing Agency will proceed at once to arrange regional and local meetings of the building industry, including lenders, to canvass rental needs and possibilities in each area, and to develop speedy construction programs.

New Legislation

Studies now under way with respect to possible further aids and incentives to rental housing by act of Congress, in addition to previous proposals such as were contained in the Wagner-Ellender-Taft bill, are to be concluded quickly. They will cover the field of cooperative and mutual housing enterprises, yield insurance, possible tax incentives, possible financing advantages and federally aided housing for low income groups.

Technical Research

Technical research in new building materials, and new methods of residential construction must be continued. The

development of modern building codes must be encouraged. The Federal Government will make its services available to aid private industry and local governments in meeting these objectives.

Cost Reduction

Producing decent housing in quantity and at a cost consistent with reasonable ability of the mass of American families to pay, is a fundamental objective. All possible waste and inefficiency must be removed, including unnecessary governmental restrictions. All possible advantage through adoption and adaptation of new methods, techniques and materials must be utilized. Mass production, applying advantages of prefabrication of varied types and industrialized procedures, offers promise in this direction, and is to be encouraged and assisted in keeping with orderly transition of the whole economy in the remaining reconversion period.

Labor

With the housing program in full swing, there may be a serious shortage of manpower in 1947 in the building trades. Therefore, continued efforts will be made to enlarge the present apprentice program and to secure adequate skilled and semi-skilled labor for home construction.

386 All that I have said thus far deals with the government's part in a vast housing program.

The success of the program however, depends not alone on the Federal Government but on state and local governments, industry, labor and financial institutions. In many communities these groups are already united through their Mayors Emergency Housing Committees and other organizations to sponsor and build homes for veterans. We, as a Nation, owe the veterans an opportunity to have homes. We will see that they get them.

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387 **Plaintiff's Exhibit No. 9**

NATIONAL HOUSING AGENCY
FEDERAL HOUSING ADMINISTRATION
WASHINGTON 25, D. C.

January 2, 1947

To: Directors of All Field Offices

SUBJECT: FHA's Rental Housing Program for Veterans

I call your attention to statements of the President on the housing program for 1947.

> "I am determined that a vigorous housing program will continue to be carried out in 1947 . . . The main point of emphasis for 1947 is rental housing . . . Within the total number of homes to be built, it is of major importance that a maximum number of rental units be provided . . . More family units must be made available for rent to veterans. They should not be compelled to buy in order to get shelter. To increase the proportion of rental units, we intend to use all available means—new construction, conversion and rehabilitation, and re-use. The great bulk of this task will fall upon private enterprise."

To accomplish these objectives the Federal Housing Administration will utilize to the fullest possible extent every facility at its disposal to encourage the immediate construction of rental housing for veterans.

The following program is designed to produce rental units that will be made available to veterans at relatively low rentals—at rentals in the intermediate range—and up to the maximum $80.00 average rental.

The Director is charged with the responsibility of securing the full cooperation of all branches of industry in order to accomplish this objective.

Means have been devised for State and District Directors and their staffs to set this program in motion at once.

Immediately effective policies governing this all-important program are outlined in this letter—every phase of our operations is geared to the production of veterans rental housing.

RENTAL HOUSING—SECTION 608

Simplification of Procedures

I have appointed a Committee which has the responsibility of simplifying processing procedures under Section 608. From time to time, the results of this Committee's work will reach you, through the proper channels, when their recommendations have been studied and adopted.

Effective immediately, "Minimum Property Requirements for Three or More Living Units" will be used as a guide only (except for statutory provisions) in both Sections 603 and 608 cases, and local Underwriting staffs may accept alternates that will produce structurally sound rental projects evidencing continued tenant appeal.

388 Requirements as to application forms, preliminary drawings, specifications and exhibits will be simplified to enable complete but expeditious processing.

The use of Form 2401-W, Project Information, is discontinued immediately in those Section 608 cases where similar pertinent data are available in the Insuring Office.

A simplified cost estimation procedure has been devised and adopted.

Detailed instructions pertaining to the foregoing will be forwarded to you at once.

$80.00 Average Rental

Rental Housing Letter 116, Change in Method of Establishing Initial Maximum Shelter Rest on Newly-constructed Rental Projects, was released on December 24, 1946. These instructions should be understood by all personnel. It is expected that rental projects can be produced to meet the needs of veterans' families at shelter rents commensurate with their ability to pay.

Reduction of Initial Principal Payment

Rental Housing Letter 115, Reduction of Initial Principal Payment on a Level Annuity Basis from a Minimum of 2% of the Original Face Amount of the Mortgage to 1½%, was released on December 18, 1946. This change in minimum amortization requirements should be emphasized in conferences with prospective sponsors and mortgagees.

Review and Amendment of Section 608 Commitments

Rental Housing Letter 17, Review of Insured Mortgage Transactions under Section 608 for the Purpose of Increasing the Mortgage Where Such Increase is Justified, was released on December 24, 1946. These instructions should be understood by all personnel.

Acceptability of Proposals for Construction of Two or More Projects which will Constitute a Large Development

Under certain conditions it may be advantageous for sponsors to submit a proposed rental housing development as several projects where each project will be financed by a separate Section 608 mortgage. Sponsors may thereby progressively construct such developments commensurate with the current availability of labor and material and effect construction financing accordingly. Attractive aspects of such a plan include tax advantages, increased scope of saleability, and less rigid regulatory requirements.

Detailed processing instructions will be forwarded you at once.

389 *Prevailing Wage Determinations*

Action is being taken here to permit expeditious handling of requests for prevailing wage determinations by the Department of Labor.

Adjustment of Section 608 Mortgage Terms

So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the Federal Housing Administration will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necessary.

Rehabilitation Projects under Section 608

An added tool in solving the rental housing problem is provided through rehabilitation programs made possible under the provisions of Section 608. There are many large apartment buildings, hotels and other commercial or industrial structures that may lend themselves to rehabilitation so as to provide a large number of rental units.

This phase of the rental housing program should be developed at once with realtors and property owners.

Detailed instructions will be forwarded you at once.

RENTAL HOUSING—SECTION 603

Two-, Three-, and Four-family Structures under Section 603

While it is expected that a large segment of the need for rental housing will be met by the construction of multi-family rental projects, both large and small, under Section 608, the Federal Housing Administration will lend strong encouragement to the development and construction of a large number of rental units in two-, three-, and four-family structures to be insured under Section 603 of Title VI.

Rules and regulations and processing instructions under Section 603 provide a simple financing device for the immediate construction of large numbers of rental units in two-family to four-family structures. Large projects under single sponsorship may be expeditiously handled under Section 603 by suitably grouping separate real estate parcels in groups of two or three or four individual mortgageable entities.

In those instances where present mortgage ceilings under Section 603 appear somewhat restrictive in relation to current costs to accommodate such rental projects, the facilities of Section 608 provide an effective complement to the provisions of Section 603 in the financing of all types of rental projects. If sponsors are primarily interested in the subsequent sale of completed rental projects, suitable release clause provisions may be worked out to accommodate individual circumstances.

309 Generally, it is likely that such subsequent sales of Section 608 projects may be refinanced under Section 603 provided statutory and underwriting requirements are met and provided separate real estate entities have been constructed and devised.

Detailed instructions as to FHA's policy with respect to release clause provisions in Section 608 mortgages will be forwarded at once.

The provisions of Section 603 will be particularly suited to the ready financing and construction of rental properties in smaller communities.

Further, Section 603 provides a suitable financing device under which smaller builders may be interested in the Rental Housing Program and similarly, it provides rental investment opportunities for non-veteran investors who may be interested in owning rental projects, occupying a single unit and renting the other units to veterans.

In both large and small communities the attention of equity investors should be invited to the attractive investment possibilities in the ownership and management of rental projects.

RENTAL HOUSING—TITLE I

Remodel for Veterans Program

To attain the objective of providing the maximum number of rental units in the shortest possible time the part played by conversion jobs is of equal importance to new construction in that every possibility to produce additional units must be pushed to the limit.

During the past year our Field offices approved priority applications for conversions to provide over 113,000 living accommodations. A tremendous impetus has been given to the conversion program and with the increasing flow of building materials, I am confident that a substantially greater number of living units will be created in the coming year. Additional rental units are needed in every community and every community now has many structures that, with imagination, planning and initiative, will provide desirable rental space.

In my letter to you on November 26, 1946 (TIF-69), I requested that you survey your local situations and see what could be done to assure greater Title I participation. In carrying out this assignment you may use effectively the Title I educational material that is available and, in addition, arrange to contact personally, at the earliest moment, your Title I lending institutions, together with the local contractors and dealers.

Suggestions, aids, and promotional ideas will be released here, for your use, as rapidly as they can be developed and approved.

391 RENTAL HOUSING EDUCATIONAL PROGRAM

Meetings with Industry and Others

I have appointed a special committee consisting of four Directors who are charged with the responsibility of developing a pattern for the conduct of regional, state and city meetings with industry and others on the subject of rental housing for veterans. This committee will convene in Washington on January 3, 1947.

The recommendations of this committee will be made available for your use as soon as such recommendations are developed and approved.

In anticipation of the receipt of this educational material, Directors will at once arrange to schedule and conduct meetings with industry and others in all principal cities during the latter part of January. The Rental Housing Program for Veterans will be given widespread publicity.

The activities of the Division of Finance and Industry at Washington headquarters will be expanded in order that FHA offices may be given all-out aid to cooperate effectively with approved mortgagees and every segment of the building industry.

Additional Personnel

I fully appreciate that an effective educational program can only be conducted by adequate, competent personnel. It is a continuing function to be conducted by personnel possessing sufficient technical and administrative ability to negotiate with sponsors, approved mortgagees and their staffs and others interested in the development of rental projects.

There has been established an additional number of administrative officer positions (in addition to the position of Assistant Director) to enable the assignment of one or more of these positions to each Insuring Office. This personnel, in addition to the State Director and the Assistant Director, will have the major responsibility of encouraging rental housing projects for veterans.

Detailed information will be forwarded you through the proper channels.

• • • • • • • • • • •

This is our program—the program of every FHA employee—to meet the objectives of the President which are fully set forth in his statement.

Never before has such a housing challenge been placed before private enterprise. Never before, in the history of the Federal Housing Administration, has there been so great a responsibility placed upon us.

This responsibility will be discharged to the limit of our ability.

Very truly yours,

RAYMOND M. FOLEY
Commissioner

72673

392 **Excerpts from Plaintiff's Exhibit No. 19**

CHARTER BY THE SECRETARY OF STATE

THE STATE OF SOUTH CAROLINA, EXECUTIVE DEPARTMENT

WHEREAS, L. D. Long and T. E. Steadman, both of Charleston, S. C., did on the 7th day of December, 1949, file with the Secretary of State a written Declaration, signed by themselves, setting forth:

393 FIRST: That their names as residences are as above given.

SECOND: This corporation will be known as The Darlington, Inc.

THIRD: The purpose for which the corporation is formed and the business and objects to be carried on and promoted by it are as follows:

(a) to create a private corporation to provide housing for rent or sale, and to acquire any real estate or interest or rights therein or appurtenant thereto and any and all personal property in connection therewith.

(b) to improve and operate, and to sell, convey, assign, mortgage or lease any real estate and any personal property.

(c) to borrow money and issue evidences of indebtedness in furtherance of any or all of the objects of its business; to secure the same by mortgage, deed of trust, pledge or other lien.

(d) to apply for and obtain or cause to be obtained from Federal Housing Commissioner a contract or contracts of mortgage insurance pursuant to the provisions of the National Housing Act as amended, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of mortgage or deed of trust securing the same. So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a rental housing project or projects.

(e) to enter into, perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of any one or more of the purposes of the corporation.

FOURTH: The post office address of the place at which the principal office of the corporation in this State will be located at King and Mt. Pleasant Streets, Charleston, So. Car. The resident agent of the corporation is T. E. Steadman whose post office address is c/o Long Corporation, P. O. Box 355, Charleston, S. C.

FIFTH: The total amount of the authorized capital stock of the corporation is $200,000.00, of which 100 shares having a par value of $1.00 per share shall be designated "Preferred Stock" and 1,999 shares, having a par value of $100.00 per share, shall be designated "Common Stock." The Preferred Stock shall have the preferences and restrictions as follows:

(a) The holders of the Preferred Stock shall be entitled to receive, when and as declared by the Board of Directors, noncumulative dividends at the rate of five cents (5¢) per share per annum, before any sum or sums shall be set apart for or applied to the purchase or redemption of the preferred stock and before any dividend or other distribution shall be declared, set apart, paid or made in respect of the common stock.

(b) The net earnings of the corporation, after providing therefrom dividends on Preferred Stock and all reserves hereinafter required, may be applied each year in payment of dividends to stockholders.

(c) The Preferred Stock at any time outstanding may be redeemed by the corporation at par and dividends declared thereon, but unpaid to the date of such
394 redemption, provided, however, that such stock shall be so redeemed, upon, but in no event before, the termination of any contract of mortgage insurance covering any indebtedness of the corporation without obligation upon the Commissioner to issue debentures as a result of such termination. Preferred Stock so redeemed shall be retired and cancelled.

(d) Anything to the contrary herein notwithstanding, no dividends shall be paid upon any of the capital stock of the corporation (except with the consent of the holders of a majority of the shares of each class of stock then outstanding) until all amortization payments due under the mortgage insured by the Federal Housing Commissioner have been paid, and until a reserve fund for replacements is first established and maintained by the allocation to such reserve fund in a separate account with the mortgagee (or in the case of a Deed of Trust with the Beneficiary) or in a safe and responsible depository designated by the mortgagee of the mortgage insured by the Commissioner unless a later date is approved in writing by the holders of the Preferred Stock, of an amount equal to $342.75 and a like amount monthly thereafter. Such fund whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal and interest by the United States of America shall at all times be under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacements of structural elements, furnishings and mechanical equipment of the project or for any other purpose, may be made only after receiving the consent in writing of the holders of the Preferred Stock.

(e) In the event of any default by the corporation, as hereinafter defined, and during the period of such default, the holders of the Preferred Stock, voting as a class, shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead; provided, however, that one of said directors shall be the owner or holder of one or more shares of common stock. When such default or defaults shall have been cured, the right to

elect directors shall again vest in the holders of the common stock.

(f) Except as otherwise provided by law or as set forth elsewhere in this certificate of incorporation, all voting rights of the stockholders shall be vested exclusively in the holders of the common stock.

SIXTH: The corporation shall not without prior approval of the holders of a majority of the shares of Preferred Stock, given either in writing or by vote at a meeting of the Preferred Stockholders called for that purpose (a) assign, transfer, dispose of or encumber any real or personal property, including rents, except as specifically permitted by the terms of the mortgage, (b) remodel, reconstruct, demolish or subtract from the premises constituting the project and subject to such mortgage, (c) permit the occupancy of any of the dwelling accommodations of the corporation except at or below the rents fixed by the schedule of rentals provided hereinafter, (d) require as a condition to the occupancy or leasing of any unit in the project the purchase of any corporate stock either from the corporation or any stockholder or the payments of any consideration other than the reasonable rental provided for in the schedule of rentals to be filed with and approved by the holders of the Preferred Stock, as provided hereinafter, (e) consolidate or merge the corporation into or with any other corporation; go into voluntary liquidation; carry into effect any plan of reorganization of the corporation; redeem or cancel any of its shares of Preferred Stock, or effect any changes whatsoever in the capital stock; alter or amend the certificate of incorporation or fail to establish and maintain reserves as set forth in this Certificate of Incorporation, (f) require as a condition to the occupancy or leasing of any unit in the project the payment to or deposit with the corporation, or any person or persons, of any amount other than the payment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the covenants of the lease.

SEVENTH: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after

commencement, any receivership, bankruptcy or other form of liquidation instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by the terms of such instruments; (3) the failure of the corporation to establish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties, or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated.

(b) In the event the mortgagor is in default under the terms of this certificate of incorporation or has failed to perform the covenants required by it to be performed under the terms of this certificate or by any mortgage insured by the Commissioner, the Commissioner may require the corporation to furnish at the expense of the corporation a complete audit of its books of account duly certified by a certified public accountant.

(c) Upon any default by the corporation, the president or the secretary, or either of them, as may be required by law, shall, at the request in writing of the holders of record of a majority of shares of the Preferred Stock, addressed to him at the office of the corporation hereinabove designated and stating the purpose of the meeting, forthwith call a special meeting to take place within ten days after such call, of the Preferred Stockholders for the purpose of the removal of existing directors and the election of new directors. If such officers shall fail to issue a call for such meeting within three days after the receipt of such request, then the holders of a majority of the shares of the Preferred Stock may do so by giving notice as provided by law, or, if not so provided, then by giving ten days' notice of the time, place and object of the meeting by advertisement inserted in any newspaper published in the County or

City in which the principal office of hte corporation is situated. When such default shall have been cured, the president or the secretary, or either of them, as may be required by law, shall, at the written request of the holders of a majority of the outstanding shares of the common stock of the corporation, call in the manner provided by law, a special meeting of the common stockholders of the corporation at which the then existing directors may be removed and new directors elected in the usual manner provided in this certificate of incorporation. Such officer shall give notice as provided by law, or, if not so provided, he shall give ten days' notice of the time, place and object of such meeting as above provided.

EIGHTH: The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation, the directors and the stockholders.

396 (a) (1) Dwelling accommodations of the corporation shall be rented at a maximum average rental per room per month fixed by the Board of Directors of the corporation and approved by the holders of the Preferred Stock. A schedule of rentals for the reasonable rental value of each apartment based upon the average as so determined shall be filed with the holders of the Preferred Stock, prior to leasing or offering for lease of any of the dwelling accommodations of the project and when approved by them, shall thereafter be maintained except as provided in Article Sixth hereof. Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders. Store accommodations shall be rented at a rental to be fixed by the directors with the prior written approval of the holders of the Preferred Stock. (2) The corporation shall have the right to charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between tenant and the corporation with the written approval of the holders of a majority of the shares of Preferred Stock, for any facilities and/or services which may be furnished by the corporation to such tenant upon his request, over and above the facilities and services to which such tenant may be entitled by virtue

of his lease, including, among other things, teelphone operator and switchboard services, electric current, gas, air cooling and conditioning and other additional or extraordinary facilities or services which may be furnished by the corporation in connection with the operation of such housing facilities.

(b) The corporation shall maintain its accommodations and the grounds and equipment appurtenant thereto in good and substantial repair and condition; provided, that in the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money deriving from any insurance on the property shall be applied in accordance with the terms of the insured mortgage on the premises.

(c) The corporation, its property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents and other papers relating thereto shall be subject to examination and inspection at any reasonable time by the Commissioner or his duly authorized agents; the corporation shall keep full and complete copies of all written contracts or other instruments which affect it or any of its property, all or any of which may be subject to inspection and examination by the Commissioner or his duly authorized agents.

(d) The books and accounts of the corporation shall be kept in accordance with the uniform system of accounting prescribed by the holders of the Preferred Stock.

(e) The corporation shall furnish the Commissioner within 60 days following the end of each fiscal year a complete annual financial report.

(f) At the request of the Commissioner, or of the holder of a majority of shares of the Preferred Stock, his or their agents, employees or attorneys, the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested.

397 NINTH: The duration of the corporation shall be perpetual.

TENTH: That after due notice, a meeting of the subscribers was held on Dec. 7th, 1949, at which a majority of all stock in value being present in person or by proxy, the following were elected directors:

L. D. Long
Leonard L. Long
T. E. Steadman

ELEVENTH: That subsequently there was elected as President, L. D. Long as Vice-President, Leonard L. Long; as Secretary, T. E. Steadman as Treasurer, Leonard L. Long.

TWELFTH: That all requirements of Article 2, Chapter 153, Code of Laws of South Carolina, 1932, and all amendments thereto have been duly and fully complied with, 50 per cent of the aggregate amount of the capital stock having been subscribed by *bona fide* subscribers, 20 per cent of the capital stock subscribed having been paid to the Treasurer, and three days' public notice of the intention to file this Declaration with the Secretary of State having been given in *The News and Courier*, a newspaper published in the County of Charleston.

398 NOW THEREFORE, I, P. T. BRADHAM, Secretary of State, by virtue of the authority in me vested by the aforesaid Code and Acts amendatory thereto, do hereby certify that the said Company has been fully organized according to the laws of South Carolina, under the name and for the purposes indicated in their written declaration, and that they are fully authorized to commence business under their charter; and I do hereby direct that a copy of this certificate be filed and recorded in the office of the Register of Mesne Conveyance or Clerk of Court in each county where such Corporation shall have a business office.

GIVEN under my hand and the seal of the State, at Columbia, this 7th day of December in the year of our Lord one thousand nine hundred and forty-nine and in the one

hundred and seventy-fourth year of the Independence of the United States of America.

P. T. BRADHAM,
Secretary of State.

(SEAL)

Certified to be a true and correct copy from the Original Charter Record in this office.
December 7th, 1949.

P. T. BRADHAM,
Secretary of State.

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399 **Plaintiff's Exhibit No. 24**

EA
Sept. 13, 1951

Mr. T. E. Steadman
P. O. Box 288
Charleston, South Carolina

Re: Project No. 054-42030
The Darlington
Charleston, S. C.

Dear Mr. Steadman:

We are pleased to advise that we are this day approving the rentals in the above captioned project as stipulated on Form 2458-W showing 99 two-room apartments at $77.50 per month; 11 2½-room apartments at $87.50 per month; 41 three-room apartments at $92.50 per month; 3 four-room apartments at $120.00 per month, and 2 six-room apartments at $250.00 per month. The rentals stipulated include the services and equipment as shown on this form.

This approval supersedes our approval dated July 16, 1951.

Yours very truly,

H. E. BAILEY,
State Director.

cc: Mr. Clyde L. Powell, Asst. Comm., FHA
Mr. Frank H. Massey, Echo Mortgage Corp.

CWL:eww

400 Plaintiff's Exhibit No. 24-A

FHA Form No. 2458-W
Rev. May 1948

FEDERAL HOUSING ADMINISTRATION

RENTAL SCHEDULE AND INFORMATION ON RENTAL PROJECT

Name of Project Owner The Darlington, Inc. Project No. 054-42030.

Address of Principal Office King and Mount Pleasant Streets, Charleston, South Carolina.

Name and Address of Corporate Resident Agent, if any T. E. Steadman, P. O. Box 288, Charleston, South Carolina.

Name, Title, and Address of Representative to whom correspondence should be addressed T. E. Steadman, Secretary, P. O. Box 288, Charleston, South Carolina.

Fiscal year Ends November 30th.

Officers	Directors
(To be completed by Corporate Owners only)	
President L. D. Long	L. D. Long
Vice-Pres. Leonard L. Long	Leonard L. Long
Treasurer Leonard L. Long	T. E. Steadman
Secretary T. E. Steadman	

Stockholders

(Non-corporate Owners list individual names only)

Name	Number of Shares	Type of Stock
L. D. Long	(1)	Common
Leonard L. Long	(1)	Common
T. E. Steadman	(1)	Common

Complete All Schedules on Page 2

401 **RENTAL SCHEDULE FOR INCOME PRODUCING SPACE DWELLINGS**

Rooms Per Unit	Composition of Dwelling Units	Number of Units @ Unit Rent Per Month
*2	LR-DS Comb.	99 @ $ 77.50
2½	LR-K-DA	11 @ $ 87.50
*3	LR-DS Comb.-BR	41 @ $ 92.50
3	LR-K-BR	
3½	LR-K-DA-BR	
4	LR-K-DR-BR	
4	LR-K-2BR	3 @ $120.00
4½	LR-K-DA-2BR	
5	LR-K-DR-2BR	
6	LR-K-DR-3BR	2 @ $250.00

* Efficiency Living Unit Only

Check Services and Equipment Included in Rent

- ☒ Water (hot and cold)
- ☒ Heat Convector
- ☐ Gas to tenant
- ☒ Elec. to tenant
- ☒ Janitor service Corridors & Lobby only
- ☒ Grounds maintenance
- ☒ Decorating
- ☐ Laundry facilities
- ☒ Ranges (elec.)
- ☒ Refrigerators (elec.)
- ☒ Kitchen Ventilation
- ☐ Attic vent fan
- ☒ Venetian blinds
- ☐ Furniture
- ☒ Other (specify) Air Conditioning & Elevators

Other Income Producing Space

Type	Number in Project	Number of Units @ Unit Rent Per Mo.
Garages		
Stores	10 Shops, launderette) and dining room)	Anticipated annual rental $20,040
Offices		

I hereby certify that the information contained on Pages 1 and 2 is complete, correct, and in accordance with the owner's records.

Date September 10, 1951.

Name /s/ Leonard L. Long,
Title *Vice President.*

Note: In rental projects regulated by the Federal Housing Administration rental schedules are subject to written approval of the Administration. Such approval must be obtained prior to leasing or offering to lease any dwelling accommodations or commercial space and prior to re-

questing permission from the Federal Housing Administration to occupy the project. Following approval rents cannot exceed the approved schedule except with the prior written approval of the Administration.

NOTE: Charter or regulatory agreement provisions require: (1) Approval of schedule of first rents prior to leasing or offering for lease any dwelling or store accommodations. This initial rental schedule shall be at a maximum average rental per month fixed by the corporation or project owner and approved by the holders of the preferred stock or Commissioner. (2) Upon approval of the first rents, such accommodations shall be rented at or below the rents so approved and shall not thereafter be changed without prior approval of the holders of the preferred stock or Commissioner.

56096 R. 5/48

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402 **Plaintiff's Exhibit No. 27**

EXCERPTS FROM HEARINGS

Before the Committee on Banking and Currency, United States Senate, Eighty-Third Congress, Second Session, on S. 2889, S. 2938, and S 2949, bills to expand Title III, Servicemen's Readjustment Act of 1944, National Housing Act, and Housing Act of 1949.

PART I

March 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, and April 14, 1954.

* * * * * * * * * *

403 STATEMENTS OF ARTHUR J. PACKARD, CHAIRMAN OF THE BOARD, AND M. O. RYAN, MANAGER, WASHINGTON OFFICE, AMERICAN HOTEL ASSOCIATION

Mr. PACKARD. As you know, I am Arthur Packard of Mt. Vernon, Ohio. I am president of the Packard Hotel Co. I operate 7 hotels throughout the State of Ohio,
404 all small hotels in small towns with about 100 rooms. I am chairman of the board of directors of the American Hotel Association, and chairman of the governmental affairs committee.

As a spokesman for the hotel industry, nationally, I am eager to call your attention to a rather aggravated problem which has developed as a result of the operation of the housing program in past years. Numerous structures, built under section 608 and section 207, have undertaken to rent units transiently, in competition with hotels.

We in the hotel business have watched this national housing program since its inception. But involved, at the outset, were issues quite apart from those represented by our industry, so in the early years we made no appearance

before your committee. But we began to have misgivings when, in widespread instances, these apartment buildings began to equip a number of units with furniture and fixtures. From there it was only one more step to overnight rental to transient guests whenever such units were not occupied by permanent tenants. We have talked to 6 or 8 members of your committee individually, over the past several years, and they all are in accord with the view that it was never congressional intent to permit any properties, constructed with Federal mortgage insurance, to equip themselves in a manner which would permit operation as a hotel. Nor was it ever contemplated that transient overnight rentals would be provided. Rather, your program has always dealt with the objective of providing homes.

The American Hotel Association dislikes the idea of opposing, in any manner, the national housing program. And we have always felt that the mortgagor, who has constructed an apartment building under FHA supervision, should be given all possible leeway in operating that property to the end that he could promptly repay the Government and redeem the mortgage. But so many of these operators have distorted the original legislative intent that we are obliged to lodge a firm complaint with your committee.

We have tried for 4 years, through every known administrative approach, to have this problem whipped by the FHA. But having failed in this direction, we are obliged to seek the assistance of your committee, and to appeal to you for some statutory safeguard against this continued unfair competition.

You know, contrary to public opinion, even under favorable circumstances, hotels are not highly profitable establishments. The United States Treasury is the author of a statement revealing that ever since 1946 hotels have shown a lesser rate of return on investment than any other service industry. Occupancy in the Nation's hotels has been declining steadily since 1947. Competition from large apartment buildings, financed with Federal assistance, could prove ruinous to us.

Already, in one city in the South, represented by 1 of the members of your committee, 2 of these section 608 apartment buildings are averaging 50 to 60 transient guests per day. That volume of business is just enough to

bring the hotels of that city down to a house count so low as to deprive them of their profit on their operations. This same thing could occur in many communities, for hotels generally, throughout the Nation, are at or near their break-even point right today.

405 Really, gentlemen, the situation is quite grave to us because as of January 31, 1954, according to FHA, there were 60,375 apartment units which have been financed under section 207, and 463,730 units built under section 608. This makes a total of 524,105 living units in apartment buildings. This is well over one-third of the total number of guestrooms in the entire hotel industry. So your housing program has created a potential successor to the hotels of the Nation.

Within the past 30 days we have learned, from unimpeachable authority, that as much as 5 or 6 years ago mortgagors, with the knowledge of FHA staff people, were intentionally designing section 608 apartment buildings with the view to enabling rapid conversion to hotels when and if needed. So, apparently, the difficulties we are encountering today are not something which have come about unwittingly, but are the product of exploitation of apparent loopholes in the housing program.

This year Congress is being requested to liberalize the mortgage insurance program, as we have known it to date. It is argued that you will need to increase the allowance per room, or per family unit, because of the fact that the actual real-estate costs for properties adjacent to business areas in individual cities are so great. Instead of a $10,000 ceiling, for a 5-room living unit, under section 207 heretofore, we understand that the measure now before you would permit the construction of a 5-room suite whose total cost could run to $12,500. The program has long since passed that point where the average valuation of the units financed bears any resemblance to the low-cost housing which we had always understood was the primary objective of your program.

The very fact that the emphasis is being placed on downtown business location multiplies the impact upon us. As the projects are paid out, under the provisions of the program now before you, the owners, a decade hence, could quickly convert to the hotel business if they chose. Thus there would spring up everywhere a new housing facility,

which could supplant the Nation's hotels. Conversion from an apartment building to a hotel is not too difficult. Actually, there are two very popular hotels in Washington, D. C., right now which were designed originally to provide permanent living quarters, with only 20 or 25 transient rooms. But today both of these properties have converted almost 100 percent to transient overnight rentals.

Until this month, we thought that all our troubles under this housing program would probably stem from sections 608 and 207 properties. However, we now learn that we have potential competition from some of the other forms of housing built under the Housing Act. For instance, under title IX, some veterans' housing was built near a naval base 2 years ago. That base has subsequently been deactivated, and the service personnel has gone. So we are told by FHA officials that one of the projects has already converted into a motel.

As I mentioned before, we have tried for 4 or 5 years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743 (b) (1), in connection with section 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved. At the outset, the agency always
406 required approval of all rent schedules. And these were normally expressed in monthly rentals. But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice.

I most certainly want to give credit where credit is due. The Commissioner did move to partially meet our problem when, on January 3, 1952, the agency issued letter No. 20 to all field offices. This required that any borrower who was applying for permission to install furniture in certain units in section 608 properties would be asked to pledge that he would not rent units transiently. But even this move had two inherent weaknesses. First, it did not in any way prevent the structures which already had fur-

nished units from continuing to rent transiently. And the agency itself contends that it does not have the staff to police the exsiting properties and to compel violators to refrain from such overnight rentals.

In some instances, these projects are openly and publicly soliciting transient business. There is one project right here in the District of Columbia, which is known as the largest apartment building in the world. It was built with mortgage insurance provided by FHA. But it is also operating 200 rooms as a transient hotel. As we understand it, this is what happened. After construction was under way, and the architect had provided for some ground-floor rentals, including a restaurant, cocktail lounge, drugstore, and so forth, it developed that zoning ordinances on that particular street would not permit such ground-floor rentals in an apartment building. But the ordinances would permit such facilities in a hotel. The mortgagor and the FHA jointly appeared before the appropriate city officials and asked for a variance, which would permit some slight deviation from the strict zoning requirements.

The Commissioners rejected their plea and told them that they should simply resort to the expediency of calling the property a hotel. This they could do by providing a certain percentage of transient rooms. So we witness a situation under which governing bodies are compelling mortgagors, even against their will, to set up hotel facilities.

The owner of this particular property told one of our FHA officials recently that he was running 42 percent occupancy in the transient rooms which he is maintaining. This represents a heavy monthly loss, substantially impairing the repayment ability of the borrower. He would like to abandon all transient rentals, but is prohibited from doing so. Accordingly, the establishment has just engaged a sales manager, whose duties will be to develop public luncheon, banquet, and convention business. We ask your committee earnestly if that type of activities is to be permitted in FHA properties.

Yesterday's paper, by the way, carries a notice and a picture of a large luncheon that was held in this particular hotel. This is undoubtedly a product of that sales program.

As we have always understood it, this national-housing program was designed to serve the low-income families of America. But the low-income families certainly do not want, or need, transient rooms and banquet facilities. And I am sure they do not need convention space.

407 Now, gentlemen, may I give your committee specific examples of the manner in which this problem is manifesting itself today.

The FHA has on file from the owner of a large apartment building in a southern city a letter in which he stated clearly that his property was not accepting transient rentals, and that he was instructing all members of his staff not to accept any overnight guests. But within the past 2 weeks, for the third or fourth consecutive time, we brought to FHA officials photostatic copies of receipts showing where transient rentals had again been accepted. These receipts showed daily charges for a single person ranging from $5 to $5.50. But the FHA replies, "Well, this particular property possessed approved monthly rentals on certain units totaling as much as $180. So, on the basis of a daily charge equaling one-thirtieth of the monthly rent, they might legally be charging as much as $6 per day." Accordingly, we submit that the hotel industry has no protection, nor apparent administrative relief.

As evidence of the duplicity which mortgagors are employing in their dealings with the agency, let me tell you something more about this particular owner whom I just mentioned. He is the man who wrote FHA, stating that he had instructed his staff to refuse transient business. This same man has just renewed, for 1954, the city hotel license covering a group of rooms which are held for transient guests. And this man has signed away all control over employees by leasing the establishment to a third party who engages all staff people.

Incidentally, we contend that it is a clear violation of the statute for FHA to permit subleases on insured properties. We cannot understand why the agency tolerates such schemes which enable mortgagors to get around the letter and the intent of the law.

So, having failed completely to secure administrative relief, we earnestly ask your committee to consider two things. First, it is imperative that a way be found to in-

corporate definite safeguards into the language of the statute, to insure the fact that FHA will not tolerate transient rentals in any rental housing so long as the mortgage runs to the Government.

I have in my files proposed specific language under which the act could be amended.

We can, if your committee wishes, propose specific language under which the act could be amended to achieve this purpose.

Or, as a possible substitute, we hope that the committee will incorporate into the report accompanying your bill a clear-cut statement that this Government-financed housing is intended to furnish shelter housing only, for low-income families, and that it is not in line with congressional intent for such facilities to be operated transiently, or to provide hotel and banquet and convention facilities.

Thank you very much.

The CHAIRMAN. Do you say you have amendments prepared?

Mr. PACKARD. Yes, we have.

The CHAIRMAN. Without objection, we will make them a part of the record at this point.

Mr. PACKARD. Yes, sir.

The CHAIRMAN. Are they short?

Mr. PACKARD. Just 2 or 3 pages.

(The amendments referred to follow:)

408 Injunctive Process

As I have pointed out, FHA has indicated a reluctance to take any effective steps to enforce the provision against transient occupancy in its contracts with borrowers under sections 608 and 207. Probably the best way of correcting this situation is to amend the act to require FHA to file a petition for an injunction in a Federal district court within 30 days after it has received written notice of the breach of contract. If FHA fails to act within the 30-day period, the law should permit any property owner to petition the Federal district court for an injunction.

I won't attempt to suggest any language for this purpose because I realize it may require an amendment to the judicial code and the Administrative Procedures Act, as well as the FHA Act.

In addition, the law should require FHA to issue regulations to prohibit transient occupancy. I have here some language which your committee might want to consider as a specific amendment to the bill. The section numbers on the language we offer for your consideration refer to the United States Code, and not to the bill you are now considering.

Amendments to National Housing Act

1. Section 1713 (a) (1): Amend subparagraph (a) (1) so as to read as follows:

"The term 'mortgage' means a first mortgage on real estate in fee simple, or on the interest of either the lessor or lessee thereof (A) under a lease for not less than ninety-nine years which is renewable or (B) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located or upon which there is to be constructed a building or buildings designed principally for permanent residential use; * * *."

2. Amend section 1713 (a) by adding a new subparagraph, reading as follows:

"(8) The term 'permanent residential use' shall mean occupancies for a term of at least one month and in no case shall occupancies or rental agreements be made for a lesser period."

3. Amend section 1715 (b), to read as follows:

"The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter and shall make and enforce rules and regulations which will insure that the rental housing is not used for other than permanent residential purposes."

4. Amend section 1743 (b) (2) by adding the following at the end thereof:

"It is the intent of this Act that the mortgaged property shall be designed and used only for permanent residential purposes and shall not be rented for periods of less than one month."

5. Amend section 1742, to read as follows:

"The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry

out the provisions of this subchapter and shall make and enforce rules and regulations which will insure that the rental housing is not used for other than permanent residential purposes."

6. Amend section 1750 b (a) so that the following is added at the end of the fourth proviso: "and preventing the rental of such properties for periods of less than one month."

7. Amend section 1750 f, to read as follows:

"The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter and shall make and enforce rules and regulations which will insure that the rental housing is not used for other than permanent residential purposes."

The CHAIRMAN. Any questions, Senator Payne?

Senator PAYNE. No.

The CHAIRMAN. Senator Sparkman.

Senator SPARKMAN. I don't believe I have any. I might say this: I have run into this problem at different times. In fact, when you mentioned a southern city you probably were referring to one down in my State.

Mr. PACKARD. That is right, one with which you are familiar, Senator.

409 Senator SPARKMAN. I was rather under the impression that it had been worked out. You know more about it than I do. I haven't heard from any of them at any time recently.

Mr. PACKARD. The southern city mentioned—the photostatic copies were from your city.

Senator SPARKMAN. Birmingham, that is right. We had that up 2 or 3 times, and I was under the impression it had been worked out.

Mr. PACKARD. It settles down for 2 or 3 weeks, and every time you catch your breath, they give you the business again.

The CHAIRMAN. Either you haven't been on the job or I haven't been on the job, because this is the first time I have heard about it. You said you talked to eight Senators on this committee. Who are they? Nobody ever said a word to me about it.

Senator SPARKMAN. The case in Birmingham is the only one that was ever called to my attention.

Mr. PACKARD. That was taken up with you, Senator, a number of times. I, of course, have talked with Senator Bricker at various times. Who else have we been in touch with?

Mr. RYAN. Senator Capehart, I am personally responsible for that statement. I have discussed the problem with numerous members of your committee.

Mr. PACKARD. May I present, Mr. Ryan, Senator, who is our representative here in Washington.

The CHAIRMAN. I don't believe it has been called to my attention. We have had one bill here by Senator Johnson which would have permitted section 608 to rent transiently.

Mr. RYAN. Mr. Chairman, we understand that Frank Pope discussed it with you.

Senator SPARKMAN. Maybe he had the same situation that I did, except mine developed to the point where a delegation of people came to Washington, and talked it over with the housing officials, but that must have been a year or year and a half ago. They have not taken it up with me since then.

Mr. PACKARD. We have had the same thing come out of Louisiana. As a matter of fact, to be perfectly honest, for instance in Mount Vernon, my own home town, we don't have that problem, but it bobs up in various cities and various sections of the country.

Senator SPARKMAN. That is particularly true where those establishments are downtown. From time to time, I assume they do serve to take care of overflow crowds. I wonder if that comes into it.

You do mention one point there that gives me a little concern, and that is about the conversion of title IX housing in one place into a motel.

Mr. PACKARD. Yes.

Senator SPARKMAN. Of course, title IX housing wasn't supposed to have been built here, except on the assurance that that was a permanent military installation.

If FHA goes in and helps build housing at a place that the Defense Department has certified as a permanent installation, and later the Defense Department deactivates

that as a military installation, FHA, of course, is left—and all of those who put any money in it—in pretty bad shape. Naturally, they are going to try to get their money out of it any way that they can. So I don't quite see
410 how it would be objectionable for somebody who was willing to take over that liability and convert it into a motel. I don't quite see why, as a means of salvaging what was in it.

Mr. Packard. For instance, Senator, it might become a matter of political expediency in the public interest to recover and salvage the taxpayers' money on a conversion of that kind. At the same time, we, under normal circumstances, accept any private finance venture as competition, that is legitimate competition, which strictly speaking, is the life of trade. We feel we are perfectly prepared and competent to handle such competition. But, when we find ourselves in the unfortunate position of competing with a business that has been financed and sponsored by the Government, in the final analysis with a portion of our own money, and at a rate of financing which is less than we can secure, we feel that is unfair competition to us as an industry.

Senator Sparkman. I think your complaint would be absolutely valid if the Government went in there originally. But I am talking about trying to salvage a loss. Let's assume they had to take it over and sell it, under a foreclosure. They would sell it to anybody that would put up the purchase price, and certainly they would have no control over them, as to whether or not they would make it into motels.

If, as a part of that purchase price, they had to continue to finance it, that is to continue an insured mortgage, it seems to me that you would really expect them to do that.

Mr. Packard. Naturally, in the public interest you want to recover all of the stockholders' money that you can. But our primary objection in this is that you have a housing program to take care of low-cost families, and we feel that under the law, as it is now written, that many of the mortgagors are taking advantage by building a type of building which they can convert overnight to a hotel, at any time they wish.

Senator Sparkman. Yes, I see your argument on that.

The only thing I wanted to question was whether if there has been a foreclosure——

Mr. PACKARD. It defeats the very purpose for which you designed the building.

The CHAIRMAN. Thank you very much, Mr. Packard.

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411 **Plaintiff's Exhibit No. 28**

HOUSING ACT OF 1954
FHA INSURANCE PROVISIONS

EXCERPT FROM HEARINGS

Before the Committee on Banking and Currency, United States Senate, Eighty-Third Congress, Second Session on S. 2889, S. 2938, and S. 2949, Bill to Expand and Extend Title III, Servicemen's Readjustment Act of 1944, National Housing Act, Housing Act of 1949, and an Amendment for Smoke Elimination and Air Pollution Prevention, and FHA Insurance Provisions.

PART 3

April 19, 20, 21, 22, 23, 28, and 29, 1954.

Printed for the use of the Committee on Banking and Currency.

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412 STATEMENT OF R. G. HUGHES, PRESIDENT, NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. Chairman and members of the committee, let me make one thing very clear at the start. The objectives of this hearing, as expressed in the constructive opening statement of Chairman Capehart, are those of the National Association of Home Builders and of myself personally. May I express to your chairman my heartfelt appreciation of the statesmanlike remarks made on Monday, which I am sure express the feeling of this entire committee. I believe that it is high time that a voice is raised to say the things that Senator Capehart said concerning the great good that has been and still can be accomplished by the FHA, and the efficiency and honesty of the overwhelming majority of its personnel.

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413 With respect to section 608, I would first like to make certain observations.

It may be helpful to the committee to have my own experience under the 608 program. I built two comparatively small 608 projects comprising 56 and 108 units, respectively. When I finished both of these I had invested in them a valuable piece of land, the expense of architects and other services of my staff, and considerable cash. To use the term that I have seen in the headlines, I did not "mortgage out."

Gentlemen, that concluded my experience with section 608. I decided to go back to the building of homes for sale.

Of the hundreds of builders to whom I have talked in the last few years, a good many have told me of similar experiences; some have told me that they came out even with no investment in the project but their time and efforts; and others have said that they have made a profit because they were able to buy cheaply through mass production, or got a break in the weather, or because they were just better builders than the average, or because the prices of materials dropped between the time of commitment and completion of the project. Of course, the committee understands that the reverse can and frequently does happen. Many a builder was caught in a rising price market.

It is in the light of this experience that I would like to make certain observations on section 608.

(1) Most, if not all, of the housing under this program was constructed at a time when our industry was under great pressure from the Government and the public to meet an acute housing shortage. Section 608 was enacted and administered at a time when both the executive and legislative branches of the Federal Government were almost frantically seeking every conceivable inducement to attain a maximum of private and public construction—particularly rental housing.

The Government even expended hundreds of millions of dollars by direct appropriation for flimsy, temporary dwellings for veterans and students, knowing that their use was justified only for a short time. We certainly do not condone mistakes made even in such an atmosphere but the

climate prevailing at the time should at least be considered and understood.

(2) The overwhelming majority of builders, prior to the war, built only homes for sale. The section 608 program was intended to attract them into the construction of rental housing and considerable effort was devoted by Federal officials to that end in order to produce the housing that was then desperately needed.

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414 The CHAIRMAN. The committee will please come to order.

I believe our first and only witness this afternoon is Mr. Samuel E. Neel, general counsel, Mortgage Bankers Association of America.

I believe, Mr. Neel, you have a prepared statement, do you not?

STATEMENT OF SAMUEL E. NEEL, GENERAL COUNSEL, MORTGAGE BANKERS ASSOCIATION OF AMERICA

Mr. NEEL. I do, sir.

The CHAIRMAN. I presume you would like to read that.

Mr. NEEL. I would like to.

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415 In connection with this section 608 program there is one further point which we specifically want to bring to your attention. At the time this program was enacted, Congress went out of its way to note that the country was desperately in need of rental housing. The program was intentionally made liberal in order to encourage builders to build these projects. With this congressional mandate the FHA undertook an intensive promotional campaign. The FHA thus not only became underwriters but they became promoters, and when they became promoters they lost sight of certain standards. As promoters, they had certain goals to meet. In order to meet the goals they could not help but loosen their standards. This will alwaye be the result when you mix sound underwriting with promotion and this is the lesson the Congress should remember. I will refer to it later.

The CHAIRMAN. Let me ask you this: Is it a fact that FHA officials and appraisers and employees encouraged

builders to go into this program on the basis that they could mortgage out and make money on their mortgages? We have heard rumors to that effect.

Mr. NEEL. I would answer that question this way, sir. There is no question but that the FHA all over the United States encouraged builders to go into this program. They made sales talks. It was just like a bond rally. They were trying to get houses built and they were trying to get builders in the program.

What reasons they gave for asking the builders to go into it are beyond my knowledge. They did conduct an intensive promotional campaign, however.

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416 Wednesday, April 28, 1954

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The CHAIRMAN. The committee will come to order.

Our first witness this morning will be Mr. Walter L. Greene. Mr. Greene, will you please come forward? Will you be sworn, please?

Do you promise to tell the truth, the whole truth, and nothing but the truth, so help you God?

TESTIMONY OF WALTER L. GREENE, DEPUTY COMMISSIONER (Retired), FEDERAL HOUSING ADMINISTRATION

Mr. GREENE. I do.

The CHAIRMAN. Thank you. You may be seated, Mr. Greene.

Do you have a prepared statement, Mr. Greene, that you wish to make?

Mr. GREENE. No, Senator; I do not have a prepared statement. I have a few suggestions that I would like to make.

The CHAIRMAN. Let me ask you a couple of questions, first, and get you identified here, so that your testimony will possibly be worth more.

How long have you been with the FHA?

Mr. GREENE. Since the inception of the FHA.

The CHAIRMAN. Since 1934?

Mr. GREENE. Yes, sir.

The CHAIRMAN. And what has been your position?

Mr. GREENE. I started out in the Birmingham office as executive assistant to the director, and transferred to

Washington in 1937, as an underwriter in the Underwriting Division.

The CHAIRMAN. Chief of the Location Section?

Mr. GREENE. Yes. That is a part of the appraising operation.

The CHAIRMAN. That is a part of the appraising operation?

Mr. GREENE. Yes, sir.

I was transferred in 1939 or 1940, and later became zone commissioner, now called regional director, for the west coast area. And then I became Deputy Commis-
417 sioner under Mr. Richards, and retained that title until 1952, when I became Commissioner. And then I again became Deputy Commissioner, when Mr. Hollyday——

The CHAIRMAN. You have been Deputy Commissioner during the entire tenure of Mr. Hollyday?

Mr. GREENE. That is right.

The CHAIRMAN. You resigned just recently?

Mr. GREENE. That is right, on the 14th.

The CHAIRMAN. April 14th?

Mr. GREENE. Yes, sir.

The CHAIRMAN. You were Commissioner how long, for how many years?

Mr. GREENE. About 9 months.

The CHAIRMAN. That was what period?

Mr. GREENE. From July 1, 1952, until April of 1953.

The CHAIRMAN. You were Deputy Commissioner for how long?

Mr. GREENE. Deputy Commissioner from 1947 to 1952, under Mr. Richards, and 1 year under Mr. Hollyday.

The CHAIRMAN. As Deputy Commissioner, did you have any specific responsibilities or duties above, say, others? I know you were a sort of assistant general manager, but did you have any specific duties above others?

Mr. GREENE. As Deputy Commissioner I had no specific operations. My job was to assist the Commissioner in the administration of the FHA and to coordinate the activities. I was chairman of the Finance Committee for 6 years.

The CHAIRMAN. You are very, very familiar, then, with the operations of title I?

Mr. GREENE. Well, I have never operated directly in title I.

The CHAIRMAN. I see.

Mr. GREENE. I am familiar with the operation.

The CHAIRMAN. As Deputy Commissioner you would be.

Mr. GREENE. Yes, sir.

The CHAIRMAN. And you are familiar with the operations of section 608?

Mr. GREENE. Yes, sir.

The CHAIRMAN. Tell us, Mr. Greene, in your own way, what you think we ought to do to tighten up or improve or eliminate from this new bill the possibilities of the alleged irregularities ever happening again that we have been hearing so much about here in the past 3 weeks. Or, if you do not think the legislation needs to be changed or tightened, tell us what you think ought to be done with the administration of the act, as written, to avoid or eliminate the things we have been hearing about.

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418 Mr. GREENE. Investors are not normally interested in this type of security.

The CHAIRMAN. That interests me very much. We have heard a lot or considerable about it since we started this study, this investigation. Why weren't they interested in this sort of thing?

Mr. GREENE. Well, an investor going into an apartment house transaction, as an investment, in the first place he will put more money into it, so that his debts will be less and his equity will be larger. And he will not have any control over his rents, since the control is off now,

419 and he will figure on a much larger return that we permitted under section 608.

The CHAIRMAN. But when he pays his mortgage off, then he can charge whatever he cares to.

Mr. GREENE. Yes. Investors are normally not interested in apartment-house property unless they can construct them on very favorable terms. We had enough investors to get a big job done. So, 608 turned to the builder, and they turned to the builder to get this job constructed, without any thought of the builder leaving a large part of his funds in that job.

Obviously, a builder, if he is going to follow the building business, can't sink a large investment in each one of these 608's that he builds. Therefore, he did try to get out without leaving any equity in the job.

The CHAIRMAN. Well, it has been called to our attention that FHA officials and personnel went out and promoted people to go into this sort of business and promised them and told them that they could get in and get out with a profit, and still own the property. Do you believe that to be true?

Mr. GREENE. Senator, as a matter of record, there is no question but what we promoted it and promoted it hard, all over the country, in order to get builders to go into this operation.

The CHAIRMAN. You think they were encouraged to believe they could make money on it, and still own them?

Mr. GREENE. I don't believe, to my knowledge, any were told they did not have to leave an investment in it. I remember the day the large placards were printed up that we used in those promotional meetings, and I recall the figures came out very decisively as the rate of earning on his equity——

The CHAIRMAN. What years were these?

Mr. GREENE. 1946, 1947, 1948.

The CHAIRMAN. Right after the war.

Mr. GREENE. Yes.

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420 TESTIMONY OF BURTON C. BOVARD, GENERAL COUNSEL, FEDERAL HOUSING ADMINISTRATION

Mr. BOVARD. I do.

The CHAIRMAN. Thank you.

Mr. Bovard, how long were you with the FHA?

Mr. BOVARD. About 19 years.

The CHAIRMAN. You were with the FHA in 1934 when the law was first passed?

Mr. BOVARD. No; 1935.

The CHAIRMAN. Were you General Counsel during that entire period?

Mr. BOVARD. No; I was appointed General Counsel in 1940.

The CHAIRMAN. What were your duties prior to that time?

Mr. BOVARD. I was Assistant General Counsel for a certain period of time. I have forgotten exactly how long. Prior to that I was an attorney in the Legal Division there.

The CHAIRMAN. Say that again, will you please?

Mr. BOVARD. I was Assistant General Counsel immediately prior to becoming General Counsel.

The CHAIRMAN. You were Assistant General Counsel from 1934 to 1940?

Mr. BOVARD. No; I came in in the summer of 1935 as administrative assistant. For a few months I was not in the Legal Division. Then I was transferred to the Legal Division as an attorney and then became Assistant General Counsel sometime prior to 1940. I have forgotten when.

The CHAIRMAN. Since 1940 you have been the General Counsel, up until when?

421 Mr. BOVARD. I am still General Counsel.

The CHAIRMAN. That's right, you are still General Counsel. Just tell us briefly what your duties are as General Counsel.

Mr. BOVARD. I am responsible for the Legal Division and advise the Commissioner and the other administrative officers with respect to interpretations of law, the legal effect of proposed action, and assist, of course, in drafting legislation and amending rules and regulations, and so forth.

* * * * * * * * * * *

422 Senator BENNETT. I had a couple of questions.

Could the reason that you required an incorporation be that you wanted a situation under which FHA could take preferred stock? Didn't FHA take preferred stock in every one of these corporations.

Mr. BOVARD. That is right.

Senator BENNETT. What was the reason for requiring these corporations to provide FHA with preferred stock?

Mr. BOVARD. So that we would have control in the event of a default in the mortgage or a default under the charter provisions. We could step in and oust the existing directors, take over effective control of the corporation.

Senator BENNETT. As I remember it, the evidence has been that the amount of preferred stock in most cases was $100.

Mr. BOVARD. That is all.

Senator BENNETT. Do you think that is enough to give you control?

Mr. BOVARD. It was a special type of preferred stock which was wholly owned by the Commissioner and was issued for that express purpose, and the charter provisions

provided that in the event of a default the preferred stockholders could, upon call of a meeting, elect their own directors, ousting the others.

Senator BENNETT. And the FHA had then two strings to its bow. It could proceed under the mortgage or it could proceed under its ownership as the owner of preferred stock?

Mr. BOVARD. FHA did not have the mortgage, of course.

Senator BENNETT. It would eventually get it in the event the mortgage was in default and was turned back by the person who was guaranteed by FHA.

Mr. BOVARD. The principal purpose of it was to control rents. It may be that the building corporation was charging rents in excess of the schedule approved by us and that the mortgage was in perfectly good standing.

423 Senator BENNETT. Did your ownership of the $100 worth of preferred stock give you the power to move in and take over the management in the event of violation of the rental agreement?

Mr. BOVARD. Absolutely.

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424 TESTIMONY OF HOWARD M. MURPHY, FORMER ASSOCIATE GENERAL COUNSEL, FEDERAL HOUSING ADMINISTRATION

Mr. MURPHY. Yes, sir.

The CHAIRMAN. Will you be seated, Mr. Murphy? You can both use the same microphone.

How long have you been with the FHA, Mr. Murphy?

Mr. MURPHY. A little over 16 years.

The CHAIRMAN. And you are the Assistant General Counsel?

Mr. MURPHY. The past title was the Associate General Counsel.

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425 Mr. MURPHY. I think the provisions of the charter govern the rights and obligations of the mortgagor corporation and the controls to be exercised by the Commissioner as holder of the preferred stock.

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426 TESTIMONY OF LEGRAND W. PERCE, DEPUTY ASSISTANT COMMISSIONER, FEDERAL HOUSING ADMINISTRATION

Mr. PERCE. I do, sir.

The CHAIRMAN. Thank you. Be seated, please.

Do you pronounce your name "purse"?

Mr. PERCE. Yes, sir.

The CHAIRMAN. Mr. Perce, how long have you been with the FHA?

Mr. PERCE. I came with the FHA on December 20——

The CHAIRMAN. Pull the microphone a little closer.

Mr. PERCE. On December 20, 1937.

The CHAIRMAN. You have been with the FHA since December 1937?

Mr. PERCE. Yes, sir.

The CHAIRMAN. What have been your duties over there, please?

Mr. PERCE. I came to the FHA as an attorney, in the Rental Housing Division. I did not seek the job. The job sought me.

The CHAIRMAN. Which Division?

Mr. PERCE. Rental Housing.

The CHAIRMAN. In 1937?

Mr. PERCE. Yes, sir.

The CHAIRMAN. And where is your home town?

Mr. PERCE. Right now I am living in Washington.

The CHAIRMAN. Where did you come from?

Mr. PERCE. I came from New York.

The CHAIRMAN. You came from New York down here in 1937?

Mr. PERCE. I came in 1934, and then I went back to New York, and came back in 1937. I was with the late NRA.

The CHAIRMAN. And you have been with the Rental Housing Division ever since?

Mr. PERCE. Yes, in the Legal Division first, and then in the Administrative Division.

The CHAIRMAN. You have been Acting Commissioner?

Mr. PERCE. I have been assistant to the Assistant Commissioner, and then a Deputy Assistant Commissioner, since June 18, 1948.

The CHAIRMAN. Who has been your immediate superior?

Mr. PERCE. Mr. Clyde Powell.

The CHAIRMAN. Mr. Powell was your immediate superior?

427 Mr. PERCE. Yes, sir, when I entered into the administrative end of it. Prior to that time I had two superiors, Mr. Herbert S. Colton, who was chief counsel, and Mr. R. Winton Elliott, chief counsel.

The CHAIRMAN. Have you had anything whatsoever to do with title I?

Mr. PERCE. No, sir.

The CHAIRMAN. In other words, your experience has been entirely with rental housing, section 608?

Mr. PERCE. Sections 207, 608, and 608 pursuant to 601, and title VIII and title IX.

The CHAIRMAN. Rental housing?

Mr. PERCE. Yes, sir. They call it multifamily housing now.

The CHAIRMAN. Multifamily housing?

Mr. PERCE. Yes, sir.

The CHAIRMAN. Is that exactly the same thing as rental housing?

Mr. PERCE. The same thing.

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428 The CHAIRMAN. What other duties are there in connection with section 608, other than arriving at the cost or the estimated cost, and agreeing to insure the mortgage? What are the other duties?

Mr. PERCE. We have the duty of releasing the mortgage, servicing the mortgage and serving the projects, to see that they do not exceed the rental ceilings——

The CHAIRMAN. See that they do not exceed what?

Mr. PERCE. The rental ceilings. It is a form of rent control.

The CHAIRMAN. It has been testified here that in every section 608 project a separate corporation was organized.

Mr. PERCE. Yes. No, sir, that isn't quite true. In the beginning, they permitted individuals to be mortgagors, particularly if the mortgage was under $200,000.

The CHAIRMAN. Did you and Mr. Powell have charge of seeing that under these section 608 projects they organized a separate corporation?

Mr. PERCE. That was part of the procedure, yes, sir.

The CHAIRMAN. I mean that was part of your responsibility?

Mr. PERCE. That was part of the responsibility of the

closing attorney, to follow the instructions set by Mr. Powell.

The CHAIRMAN. Did the closing attorney work for you?

Mr. PERCE. When I was chief counsel of rental housing he worked under my direction. Not exactly for me, but under my direction.

The CHAIRMAN. Well, whose idea was it that a separate corporation should be organized to own each of these section 608 projects?

Mr. PERCE. I think that grew out of our experience in the earlier part of the program, when we had individual mortgagors, and we also had corporate mortgagors. It was found from experience that you could control a corporate mortgagor by owning preferred stock much easier than you could control the operations of an individual under a regulatory agreement. A regulatory agreement had practically the same provisions in it.

The CHAIRMAN. What control did you want to hold over them?

Mr. PERCE. First, we wanted to see that they kept the job of doing the repairs. Second, we wanted to see that they made no charges other than those approved by the Commissioner. Third, we wanted to see that they did not exceed the rent, because the act provided that we could control rents, to provide reasonable rents for the tenants and a reasonable return to the owner.

And we also had to police the job, service the job. And we also had questions of the reserve for replacement, which was set up in the charter provisions for replacing structural elements and such things as refrigerators and ranges when they wore out, and we wanted to see that they didn't dribble that away.

• • • • • • • • • • •

429 The CHAIRMAN. Well, let me ask you this: You controlled these corporations, through holding $100 worth of preferred stock, did you?

Mr. PERCE. Yes, sir.

• • • • • • • • • • •

The CHAIRMAN. What did you control, then?

Mr. PERCE. We tried to control the rents.

The CHAIRMAN. You just controlled the rents?

Mr. PERCE. And the operations with respect to maintenance and reserve for replacement.

• • • • • • • • • • •

430 Senator BUSH. Isn't it true you conceive the law to be designed to stimulate these projects?

Mr. PERCE. Yes, sir.

Senator BUSH. And that your inclination would naturally be, under the law, the way it is drawn, to encourage the building of these projects?

Mr. PERCE. Absolutely. That was what ran through my mind.

Senator BUSH. My observation, Mr. Chairman, is that the law encouraged them to do just what they did.

Mr. PERCE. I think so.

• • • • • • • • • • •

431 Senator BENNETT. Mr. Chairman, may I make a comment?

The CHAIRMAN. I didn't write the law. It was written back in 1940. I wasn't here, so I can't tell what the intention was.

• • • • • • • • • • •

Senator BENNETT. Mr. Chairman, may I make a comment?

The CHAIRMAN. Senator Bennett.

Senator BENNETT. I have listened to this discussion about capitalization of these corporations. It seems to me very clear—and it was testified to yesterday, I believe—that the Government would not deal with an individual; they required a corporation. And the purpose of requiring a corporation was, first, that they might hold the preferred stock and thus have a privilege of control.

Secondly, that they might, through the charter, specifically spell out the power of the Commissioner to interfere with the operation of the corporation.

If that was the purpose of requiring incorporation, it could have been achieved just as well with a corporation set up to meet the minimum requirements of a State law, as it could if they required the larger capitalization.

The purpose of the corporation device, as I see it, was, first, to make sure that the preferred stock was available to the Commissioner and, second, to make sure that every

borrower was bound by the limits of the charter on which these corporations were set up.

. . . . . .

432 **Plaintiff's Exhibit No. 30**

Congressional Record—Wednesday, July 28, 1954, Vol. 100, No. 143

The following appears on the record of debate in the Senate on the Housing Bill:

. . . . . .

Mr. SMATHERS. Will the chairman of the committee tell us what the conferees did insofar as the mortgage hotel amendment is concerned, and its application to section 608 apartments?

MR. CAPEHART. I shall reach that a little later; but if the Senator from Florida wishes me to speak about it for a moment, I shall say I think the action of the conferees should be entirely satisfactory to the able Senator from Florida. We amended that part of the law, so it will not be retroactive.

We provided that if any hotel owned any section 608 project which had written permission from the FHA,
433 prior to the enactment of this law, to become a hotel or partially a hotel, it may do so, provided it had a written contract with the FHA. We also wrote in a provision whereby, under section 608, any such project in a stricly 100 percent tourist section could, under certain conditions and at certain times of the year, operate partially as a hotel.

Mr. SMATHERS. Is it the view of the Senator from Indiana that that will take care of most of the complaints?

Mr. CAPEHART. We think so, and we hope so, and it was our intention to do so.

Mr. SMATHERS. Does the Senator from Indiana think that the reference to "100 percent tourist area" might result in causing difficulties?

Mr. CAPEHHART. That certainly would not include New York or Washington, but it certainly would include Miami, Fla.

Mr. SMATHERS. And also Daytona Beach and similar places?

Mr. CAPEHART. Yes.

• • • • • • • • • • •

Mr. CAPEHART. • • • Under the law I have just read, that is, the law with the 1947 amendment, with any sort of efficient administration or any sort of regulations these situations could have been avoided. The FHA simply went wild. The part of the FHA that was involved, headed by a man named Powell, went out to promote these projects. They even conducted schools to educate and show builders how they could build these projects without putting in any of their own money. We have uncovered letters they wrote showing how that could be done. • • •

• • • The FHA people just went wild. They went out to promote this business. They had what I would call sloppy administration. • • •

• • • As I say, FHA officials went all out. They say the reason they did so was in order to get housing. They wanted to get a lot of rental housing. They were promoting. They simply became salesmen. The FHA officials and FHA employees were promoters. They went up and down the land, promoting people into the business. • • •

• • • If any blame is to attach, it should attach to Congress, because the laws passed by Congress permitted such operations. • • •

• • • I just finished saying that in my opinion the law was good enough to have avoided all these irregularities had the FHA officials properly administered it, and used even an ounce of god, common horse sense. I said that once, I repeat it, and whether there was a cutoff date
434 on section 608, or whether there was not, and whether — there were many applications on file when the cutoff date arrived and was extended for a few days, makes no difference at all, because had those responsible administered the law correctly and efficiently, there would have been no necessity for any of the so-called mortgaging abuses. • • •

Mr. CAPEHART. (continuing). • • • Senators, we can argue this question until 12 o'clock tonight and longer, but I again say that to date our investigation proves that FHA

officials deliberately promoted this whole business. They sold builders on the idea that they could proceed with a project without putting any of their money into it. * * *

* * * * * * * * * * *

Mr. FREAR. * * * Does the Senator feel, as many persons do, that even though the Administration was to blame for many of the things which happened, it also took two-individuals, companies, parties, or corporation and the FHA—to make a contract, so that those who received the windfalls deserve to have some of the blame on their shoulders.

Mr. CAPEHART. There is no question about it, because the industry in my opinion knew what was going on. The testimony before our committee had been that it was not going on, that it could not happen, and therefore we ought to leave everything as it was.

It appears that it has been one big grand promotion on the part of the FHA and, in many instances, the industry. I do not want to condemn all of them, because that is not true of all of them. * * *

* * * * * * * * * * *

Mr. ROBERTSON. * * * I can explain primarily why they are there. The chairman of the committee and the Senator from South Carolina (Mr. Maybank) will recall that when we first got the administration bill, I said the best way to plug the loopholes is not to guarantee any mortgage more than 80 percent. But the administration, in order to stimulate the building of certain types of houses, went up in its recommendation to 100 percent * * *

* * * * * * * * * * *

Mr. SPARKMAN. I desire to call attention to a few of the factors which made the section 608 program necessary. It is easy for us to stand here now and condemn the program. Yet when it was written into the law, it was done because it was felt that it was necessary to do so. It was done in order to encourage people to build rental units.

When the war ended, millions of veterans were searching for places to live. They were seeking any places which would enable them and their families to enjoy decent shelter while they went about the business of obtaining new em-ment.

435 What made the postwar section 608 program necessary?

Let us take a look back in history. When the war ended there were millions of veterans searching for a place to live, any place that would enable them and their families to enjoy decent shelter while they went about the business of becoming again a normal part of the civilian community. Underbuilding during the depression years and practically a cessation of home-building during the war years meant that we were ill-prepared to take care of the housing problems of these veterans when the war ended. By 1945, homebuilding had fallen to slightly over 200,000 a year.

A survey made by the Census Bureau in early 1946 showed that of the 11 million veterans discharged by that time, 4 million wanted and needed new housing accommodations within a year, 2.2 million of them wanting the housing immediately. And half of the veterans then wanting housing, wanted to rent rather than buy.

Look at the statistics of home building then to see how ill-prepared we were to handle these needs in 1946. Not only had home building of all kinds fallen off sharply by 1946, but the rental portion of even that small amount had fallen even more; in the 1920's rental housing made up about 40 percent of all new building, in the 1930's about 22 percent, in the war years about 17 percent, and in 1945 and 1946 only about 11 percent. Think of it. Only 11 percent at a time when about 50 percent of the homeseeking veterans needed rental housing. And in 1945, when the war ended, we were producing only 208,000 dwelling units of all kinds, and of these only 22,000 were rental units.

So, in order to help these veterans in a time of real emergency we borrowed from the very successful wartime practices, and undertook a program of liberal credit aids to private rental housing, a program intended to get builders and developers into rental housing who would not otherwise have undertaken it, and to get the few builders then doing rental housing to expand their operations. This was the section 608 program.

Let us look at what Senator Robert A. Taft, then majority leader of the Senate, said of this program on the

Senate floor on August 6, 1948, after it had been in operation for 2 years:

> 'The other main defect in the housing program has been difficulty in getting anybody to build houses for rental. * * * There was practically no success under title II. * * * So we have decided to continue 608, hoping it will encourage the building of rental housing. (From the Congressional Record of Aug. 6, 1948).'

LEGISLATIVE BACKGROUND OF THE 608 PROGRAM

The Congress, to its credit, early recognized the housing crisis, and the need of liberal legislation which would bring a greater number of builders, particularly sales housing and small builders, into the rental field. It
436 was recognized that many builders would have been either unable or unwilling to enter the rental field if a considerable sum of risk capital were necessary.

On 10 separate occasions between 1946 and 1950, the Congress considered and enacted legislation pertaining to the 608 program. Our legislative records are replete with information about section 608. On its face, the original bill, the Veterans Emergency Housing Act of 1946, contemplated that the typical builder need invest little more than his profit and fees. From its very inception, the Congress was aware of liberality of the law and that projects might be built with little equity investment. Let me quote some pertinent extracts from the hearings and the debates.

Senate Report No. 1130, 79th Congress, to accompany H.R. 4761, April 5, 1946, page 8, H.R. 4761, the Veteran's Emergency Housing Act of 1946 had been unanimously reported to the Senate by the Banking and Currency Committee:

> The bill provides for the minimum indispensable first things which must be done to solve the critical problem of housing for veterans of World War II.
>
> The bill contains an adaptation of title VI of the National Housing Act, used during the war for war workers, so as to stimulate the expansion of privately financed housing with mortgage insurance under cur-

rent conditions and with priority of use for veterans and their families.

Since a main purpose of these provisions is to reduce the risks assumed by builders in order to encourage a large volume of housing, the committee calls special attention to the fact that this portion of the bill places emphasis upon rental housing. It is the specific intent of the committee that those in charge of the program shall make every reasonable effort to obtain a substantial volume of rental housing—or in any event housing held for rental during the emergency—through the operation of title VI, both with respect to multifamily units and individual units.

In hearings before a subcommittee of the Committee on Banking and Currency—of which subcommittee I may say I was chairman—United States Senate, 81st Congress, on S. 2246, Housing Amendments of 1949, July 26-29, 1949, pages 443-449, the Senator from Louisiana (Mr. Long) made the following statement after questioning housing officials at length about FHA's administration of section 608 and the possibility of builders financing 608 rental housing with little or no investment, page 443:

> I want to say right here now that frankly I believe this project was intended to be extremely profitable to builders; and that the purpose was based on the American tradition that if you want to get a job done, if you will show American businessmen where they can make a hefty profit, they will really get out there and do you a job. • • •

437 Mr. Sparkman had printed in the record the following remarks of Senator Bricker (Ohio) made previously in connection with a prior extension of section 608:

> "The extension of section 608 recognized the continuing urgent need for rental housing which justified special incentives for its construction. There is no question that this need continues. The present rate of rental housing construction is clearly inadequate to meet the need. • • •
>
> • • • • • • • • • • •
>
> "Actually, the title VI operation was an emergency type of operation originally established in the war

period, just before the war in the defense period, to meet a special emergency of need for housing, and fast. (p. 395)." • • •

The following is quoted from Mr. Sparkman's address which was ordered printed in the record:

• • • The 608 program broke the back of the post-war rental housing shortage. It provided good rental housing quickly to meet the needs of our returning veterans. The 430,000 units it provided after 1946 (35,000 units were provided under similar legislation during the war) meant a quick and almost incredibly large response to the Government program designed to provide rental housing. It was undoubtedly one of the most successful of all Government housing programs. It brought the rental-housing percentage of all new units up to as high as 20 percent by 1949. Today, without 608, it has fallen to 12 percent, almost as low as it was when the 608 program started.

The 608 program helped the American people to meet their obligations to the returning servicemen. It helped meet the needs of a vast number of returning servicemen and their families who would otherwise not have been adequately housed. Without the housing provided thereby, we would not only have a continuance of the serious housing emergency that confronted us on war's end, but the few new rentals built would have been at prices far beyond the reach of the average veteran, and we would still be plagued with a severe housing shortage. Moreover, if we had not been able to increase the supply of rental housing during a period of very heavy demand, the normal operations of supply and demand would have meant zooming prices on all new rental housing. • • •

• • • Mr. President, these are matters of history—of indisputed, incontrovertible fact. Here we have a program designed to aid the veteran to get rental housing, which did that very thing more successfully than we had ever hoped, which broke the back of the most severe housing shortage in our history, which provided adequate housing at reasonable rents—at lower rents than they could otherwise have been provided, which provided the housing at a time when no other device could have succeeded, and which did it without using 1 cent of Government money. • • •

438 **Plaintiff's Exhibit No. 31**

EXCERPTS FROM PLANNING RENTAL HOUSING PROJECTS

Revised September 1947

FEDERAL HOUSING ADMINISTRATION

439 FORWORD

The purpose of this book is to demonstrate for prospective applicants for mortgage insurance under the provisions of Section 207 of the National Housing Act and Section 608 of the revision to that Act, what, in the opinion of the Federal Housing Administration, are the desirable principles to be observed in the planning of the building or buildings of a rental project, and of its site.

440 LIVING UNIT SIZES AND CHARACTERISTICS

Except in efficiency units, each family living unit should have not less than three habitable rooms and one bathroom.

Again excepting efficiency units, each separate living unit should provide the complete living facilities for family life ordinarily considered necessary to a permanent home, consisting of connected rooms of sufficient number and size as noted below, so arranged and equipped as to provide suitable accommodations for living, sleeping, cooking, dining, storage and sanitary facilities.

The possibility of use of the living room as sleeping quarters must be considered in planning the small living units that low rents make necessary. In locations
441 where efficiency living units are acceptable, some will have no separate bedroom. In units of this type, provision should be made for closet space large enough to accommodate a bureau or chest of drawers.

442 Particularly in large urban centers, there are many childless families in which both husband and wife have gainful occupations. For these people, the small kitchen with reduced facilities may be entirely appropriate since frequently breakfast is the only meal prepared at

home and other meals are taken at restaurants. Hence, kitchenette apartments are appropriate near the center of a city but in outlying locations where tenants must travel several miles to reach a restaurant, kitchenettes should be avoided.

Kitchenettes are suitable only for *efficiency* living units of one bedroom or none, because their acceptance is limited to these two types. The cooking facilities provided in these compact kitchens are generally inadequate for the preparation of meals for a family that would require two bedrooms.

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443 **Plaintiff's Exhibit No. 32**

FEDERAL HOUSING ADMINISTRATION

. . . . . .

EXCERPTS FROM HANDBOOK FOR EMPLOYEES

. . . . . .

444 PART I

THE FEDERAL HOUSING ADMINISTRATION

. . . . . .

What the FHA Does

The first thing to learn about the FHA is that it does not lend money and does not plan or build housing. Its program is carried out entirely through the voluntary cooperation of private enterprise.

Under authority of the National Housing Act, as amended, the FHA provides insurance against loss on several types of loans made by private lending institutions. It also insures yields on investments in debt-free rental housing for families of moderate income.

All mortgage loans insured by the FHA provide for amortization by gradual repayment in regular monthly installments which include principal, interest, the FHA mortgage insurance premium of ½ of 1 percent annually on outstanding balances, fire and other hazard insurance premiums, real-estate taxes, and special assessments, if any.

. . . . . .

445 Home Mortgage Insurance

The insurance is based on a risk rating system developed by the FHA which takes into account the acceptability of the property, the neighborhood, the borrower, and the mortgage pattern.

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446 **Plaintiff's Exhibit No. 33**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

Personally appeared before me John W. Finley, who being duly sworn, does upon oath, depose nad say as follows:

1. That he is the Manager of the Apartment House known as The Darlington, owned by Darlington, Inc., and that he has been manager of said apartment house since July 15, 1951.

2. That the records of the said corporation show that it has always had unfurnished apartments available for tenants; further, that there has never been any refusal to rent an unfurnished apartment to any eligible tenant for a term of 30 days or more in said apartment building.

3. That no eligible applicant for occupancy for a term of thirty days or more, has ever had to wait, even as much as one day, to secure an unfurnished apartment in said apartment building.

4. Further, that a considerable number of tenants occupying apartments in said apartment building for terms of less than thirty (30) days are Reserve Officers of the Navy and Air Force who are stationed in the Charleston area with their wives and families and who are stationed in the Charleston area for two or three week periods of training duty.

5. Further, that said Darlington Corporation frequently receives requests from officials of the United States Navy Yard at Charleston for housing accommodations for Reserve Officers stationed at such Navy Yard for short

447 periods of training duty of less than thirty (30) days, and in an effort to cooperate with the Navy Department and the National Defense Program said corporation has on numerous occasions made available said accommodations to such officers.

JOHN W. FINLEY.

Sworn to and subscribed before me this 10th day of August, 1955.

L. C. BARKER,
Notary Public for South Carolina.

(SEAL)

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448 **Plaintiff's Exhibit No. 35**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

Personally appeared before me T. E. Steadman, who being duly sworn, deposes and says:

That he is secretary of The Darlington, Inc., owners of the Darlington Apartments located at King and Mount Pleasant Streets, Charleston County.

That he is familiar with the books and records of the company, and that the records of the company will disclose the following in reference to furnished apartments situate in the Darlington Apartments:

1. That all furniture situate in the building, made use of in the furnished apartments for which a rent is collected by the Darlington Apartments, is owned by the Long Corporation.

2. That the Darlington Apartments acts simply as the agent for the Long Corporation in the collection of the rent for the furniture used in the apartments. That in reference to apartments that are rented for 30 days or longer, the records of The Darlington, Inc. will show that this money is actually paid each month to the Long Corporation as collected.

3. That the records of The Darlington, Inc. will show with reference to such furnished apartments as are rented for 30 days or less, that the rent collected from the tenant,

1/30th of the scheduled rent set for the unfurnished apartment, is credited each day to The Darlington, Inc. That the remainder is credited to the Long Corporation. That the records of the company will show that The Darlington, Inc. stands no expense for the repair or maintenance of the furniture or for the washing and cleaning of the linen used in the apartments rented for 30 days or less. This expense is cared for by the Long Corporation out of the portion of the rent they receive.

448 4. That the records of The Darlington, Inc. will further show that the janitor's expenses for cleaning of apartments rented for 30 days or less is charged to the Long Corporation.

5. That the records of The Darlington, Inc. will disclose that at the time furniture was made available to the tenants of the apartments desiring furnished apartments, The Darlington, Inc. had no available funds with which it could have made the purchase of the furniture.

T. E. STEADMAN.

Sworn to and Subscribed before me this 23rd day of September, 1955.

A. WILLIAM HEMINGWAY,
(*Notary Public for South Carolina*)

(SEAL)

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450 **Plaintiff's Exhibit No. 36**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AFFIDAVIT

Personally appeared before me, T. E. Steadman, who being by me duly sworn, does upon oath, depose and say as follows:

1. That he is Secretary of the Darlington, Inc., the corporation which owns and operates The Darlington, an apartment house in Charleston County, South Carolina, upon which the Federal Housing Administration has insured a mortgage.

2. That he has custody of, and is familiar with the records, books, accounts, financial statements, profit and loss

statements and history of such corporation and its apartment building.

3. That from an examination of such records, books, accounts, financial statements and profit and loss statements, affiant certifies that during the period from July 27th, 1951, the date on which such apartment house was placed in operation, and began accepting tenants for occupancy of its apartments, to November 30th, 1951, said corporation suffered a net operating loss of $73,112.61.

4. Affiant further certifies that such examination discloses that during the period from December 1st, 1951 to November 30th, 1952, said corporation suffered a net operating loss of $44,499.48.

5. Affiant further certifies that such examination discloses that during the period from December 1st, 1952 to November 30th, 1953, said corporation suffered a net operating loss of $6,307.40; that such loss would have been much greater except for the rental of some of the units in said apartment building for terms of less than thirty days.

451 6. Affiant further certifies that such examination discloses that during the period from December 1st, 1953 to November 30th, 1954, said corporation suffered a net operating loss of $3,792.80; that such loss would have been much greater except for the rental of some of the units in said apartment building for terms of less than thirty days.

7. Affiant further certifies that such examination discloses that during the period from December 1st, 1954 to June 30th, 1955, said corporation gained a net profit of $6,742.67; that had it not been for the fact that some of the units in said apartment building were rented to tenants for terms of less than thirty days, said corporation would have gained no net profit at all, but on the contrary would have suffered a serious net operating loss.

T. E. Steadman.

Sworn to and subscribed before me this 10th day of August, 1955.

A. William Hemingway,
Notary Public for South Carolina.

(Seal)

452 **Plaintiff's Exhibit No. 41**

FEDERAL HOUSING ADMINISTRATION
WASHINGTON 25, D. C.

February 15, 1952

Title VIII, Military Housing, Letter No. 27, Section 207, RH-148, Section 608, Rental Housing, Letter No. 219, Section 908, Rental Housing, Letter No. 6.

To: Directors of All Field Offices

SUBJECT: Covenant to Be Added to the Model Forms of Mortgages for Use Under Sections 207, 608, 908, and Title VIII.

Attached is a form of mortgage covenant which shall be made a part of all mortgages presented for mortgage insurance under Sections 207, 608, 908, or Title VIII on or after March 1, 1952.

The attached form of covenant is designed to assist the enforcement of compliance by mortgagors with FHA approved rent ceilings and to require operations by mortgagors within the intent of the National Housing Act. The covenant provides that a violation of FHA approved rent ceilings or the renting of accommodations for periods of less than one month shall, at the election of the mortgagee, constitute a default under the mortgage.

Very truly yours,

CLYDE L. POWELL,
Assistant Commissioner.

Attachments

103907 COMMISSIONER'S CLEARANCE No. *2549*

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453 **Plaintiff's Exhibit No. 41(A)**

THE FOLLOWING COVENANT MUST BE MADE A PART OF ALL MORTGAGE AND DEED OF TRUST FORMS PRESENTED FOR MORTGAGE INSURANCE UNDER SECTIONS 207, 608, 908, OR TITLE VIII ON OR AFTER MARCH 1, 1952

The mortgagor covenants and agrees that so long as this mortgage and the note secured hereby are insured under the provisions of the National Housing Act, it will

not rent dwelling accommodations in the mortgaged premises at rental rates in excess of the rates permitted under its Aritcles of Incorporation or for periods of less than one month or in excess of three years, nor rent the premises as an entirety. Upon any violation of this undertaking, the mortgagee may, at its option, declare the unpaid balance of debt secured hereby immediately due and payable.

NOTE: The words "mortgagor"; "mortgagee"; "mortgage" and "note" may be changed to agree with the corresponding terms used in the particular instrument.

SECOND NOTE: If the recording laws and procedures in the particular State will not permit this covenant to be added as a rider to the mortgage form, it will be necessary to type the mortgage form to include the rider or reprint the form, and in any such instances, mortgagees should communicate with the local FHA insuring office. This covenant will be included in all applicable FHA approved mortgage forms in subsequent reprints.

Plaintiff's Exhibit No. 42

THE DARLINGTON, Inc.
KING ST. AT MT. PLEASANT
CHARLESTON, S. C.

RECEIPT **No 12801**

_____ 195

RECEIVED FROM _____

_____ DOLLARS

RENT - - - - $_____ APARTMENT NO._____ FROM_____ 195 TO _____ 195

SECURITY DEPOSIT _____
TELEPHONE _____
FURN. RENT _____
_____ _____
_____ _____

TOTAL - - $_____

CASH ☐ CHECK ☐

HAVE YOU
LEFT YOUR
KEY

THE DARLINGTON, Inc.

_____
Authorized Signature

Daggett-

THE DARLINGTON, Inc.
KING ST. AT MT. PLEASANT
CHARLESTON, S. C.

RECEIPT **No 12801**

_____ 195

RECEIVED FROM _____

_____ DOLLARS

RENT - - - - $_____ APARTMENT NO._____ FROM_____ 195 TO _____ 195

SECURITY DEPOSIT _____
TELEPHONE _____
FURN. RENT _____
_____ _____
_____ _____

HAVE YOU
LEFT YOUR

THE DARLINGTON, Inc.

THE DARLINGTON, Inc.
KING ST. AT MT. PLEASANT
CHARLESTON, S. C.

RECEIPT Nº 12801

_____ 195____

RECEIVED FROM _____

_____ DOLLARS

RENT - - - $_____ APARTMENT NO._____ FROM_____ 195 TO _____ 195

SECURITY DEPOSIT _____
TELEPHONE _____
FURN. RENT _____
_____ _____
_____ _____
TOTAL - - $_____

CASH ☐ CHECK ☐

HAVE YOU LEFT YOUR KEY

THE DARLINGTON, Inc.

_____
Authorized Signature

155

Daggett-

THE DARLINGTON, Inc.
KING ST. AT MT. PLEASANT
CHARLESTON, S. C.

RECEIPT Nº 12801

_____ 195____

RECEIVED FROM _____

_____ DOLLARS

RENT - - - $_____ APARTMENT NO._____ FROM_____ 195 TO _____ 195

SECURITY DEPOSIT _____
TELEPHONE _____
FURN. RENT _____
_____ _____
_____ _____
TOTAL - - $_____

CASH ☐ CHECK ☐

HAVE YOU LEFT YOUR KEY

THE DARLINGTON, Inc.

_____
Authorized Signature

Daggett-

156

457 **Plaintiff's Exhibit No. 43**

FEDERAL HOUSING ADMINISTRATION
WASHINGTON 25, D. C.

August 17, 1956

To: All Mortgagors Under Title II, Sections 207 and 220; Title VI, Section 608; Title VIII, Section 803 (Wherry Projects Only); and Title IX, Section 908.

SUBJECT: Revised Model Form of Corporate Charter; Dividends and Stock Redemption; Request for Information.

Recent determinations with respect to Administrative policy have resulted in amendments to the rules of the Federal Housing Administration and the issuance of a revised Model Form of Corporate Charter for use in cases insured or to be insured under the referenced Sections of the National Housing Act, except projects insured under the provisions of Title VIII, as amended by the Housing Act of 1955.

This letter concerns policy determinations with respect to the controls over the operations and activities of these projects which are presently exercised by this Administration. These changes, which the new form of charter will impose with respect to cases to be insured, may be summarized as follows:

(1) Dividends or other distributions may be made from "surplus cash". It will, however, still be the responsibility of the officers and directors to determine that any declaration of dividends or other distributions comply with state law;

(2) The redemption of special classes of stock or payments on approved obligations may be made at the discretion of the mortgagor, provided that they are made from "surplus cash";

(3) Loans, advances, or investments by mortgagors are permissible provided they are made from funds representing "surplus cash";

(4) Projects having mortgages of $200,000 or less and which are not components of a group of commonly owned projects and which meet certain other requirements will no longer be required to submit detailed financial reports but may file their annual reports in greatly simplified form;

(5) Mortgagors will be permitted to increase rents without obtaining prior written approval of this Administration, provided that such rents do not exceed the amount set forth in the project analysis or the maximum rents approved by the director at the time of initial occupancy. There shall, of course, be adjustments to compensate for any decreases in services or facilities which are approved subsequent to the establishment of such rents.

(6) With respect to proposals by mortgagors to provide services, facilities or accommodations not contemplated at the time of processing, it will be required only that mortgagors own any equipment involved, and that they obtain approval of the offering of such facilities, accommodations or services. Mortgagors will be permitted to charge the current rates in the locality for similar services or facilities.

May 24, 1957

In Evidence
Exhibit No. P-43
ERNEST L. ALLEN
C.D.C.U.S., E.D.S.C.
Criminal Action No. _____

458 It has been determined that this Administration will offer to all mortgagors presently having mortgages insured under the above cited Sections of the National Housing Act, who wish to do so and can meet certain prerequisites, the opportunity either to amend their corporate charter or regulatory agreement, as the case may be, or to enter into an agreement with the Administration to be bound by the terms of the Model Form of Charter, revised 1956.

Detailed instructions for processing requests have been forwarded to the directors of all field offices, and any mortgagors who wish to convert should communicate with the director of the field office having jurisdiction for approval

and for detailed information with respect to requirements.

The provisions of my letter of May 18, 1954, on the subject of "Dividends and Stock Redemption" will, of course, be waived with respect to mortgagors accepting the opportunity to be governed by the revised Rules.

In order that the records of the Administration may be maintained in a current status at all times, it is requested that all mortgagors, whether or not they wish to accept the opportunity to convert, promptly forward to the *Director, Mortgage Insurance Division, Federal Housing Administration, Washington 25, D. C.*, the names of all officers, directors and stockholders (or owners if not a corporation) and the name and address of the person to whom correspondence concerning the affairs of the mortgagor should be addressed.

All mortgagors are requested to promptly advise this Administration of any subsequent changes in ownership or corporate address.

Very truly yours,

NORMAN P. MASON,
Commissioner.

459

MODEL FORM OF CERTIFICATE OF INCORPORATION

(For Use by Rental Housing Mortgagors Under Sections 207 and 220 of the National Housing Act, as Amended)

• • • • • • • • • • •

ARTICLE I.—NAME

That the name of the Corporation is _____.

ARTICLE II.—ADDRESS

The Post Office address of the place at which the principal office of the Corporation in this State will be located is _____, and the resident agent of the Corporation on whom process may be served is _____, whose post office address is _____.

ARTICLE III.—PURPOSES

The purpose for which the Corporation is formed and the business and objects to be carried on by it are as follows;

460 (a) to create a private Corporation to construct and operate a rental housing project designated as:
Project No. _____
Name: _____
Location: _____

for the rental of units on a monthly or yearly basis to be regulated by the Federal Housing Commissioner (hereinafter referred to as the Commissioner) as to rents or sales, charges, capital structure, rate of return, and methods of operation in the manner and for the purposes provided in Section _____ of Title _____ of the National Housing Act as amended and the Administrative Rules and Regulations thereunder. So long as any property of this Corporation is encumbered by a Mortgage or Deed of Trust insured under the National Housing Act or held by the Commissioner, the Corporation shall not engage in any business than the construction and operation of such rental housing project; except as hereinafter provided.

* * * * * * * * * * *

461 ARTICLE VII.—PROVISIONS FOR CORPORATE OPERATION

The following provisions are hereby adopted for the conduct of affairs of the Corporation and in regulation of the powers of the Corporation, the directors and stockholders:

Section 1. Rental Provisions and Limitations

Prior to opening of all or any part of the project for rental, the corporation shall obtain written approval of the holders of the Preferred Stock of a rental schedule, establishing its maximum rental charges. No increases in charges from the rental schedule so approved shall
462 be made except with the consent of the Preferred Stockholders nor shall any charges be made by the corporation or by any other persons for any accommodations, facilities or services offered by the project in excess of those previously approved in writing by the holders of the Preferred Stock. Dwelling accommodations shall not be rented for periods of less than one month nor in excess of three years. Except with the prior approval of the Preferred Stockholders, no part of the project shall be rented to any person or organization for the purpose of subrenting, nor shall the property of the corporation be

rented as an entirety. Store, office, or other commercial accommodations, if any, shall be rented according to a schedule fixed by the directors and approved in writing by the holders of the Preferred Stock prior to the renting of such accommodations.

463 **Defendant's Exhibit No. 1**

FEDERAL HOUSING ADMINISTRATION
WASHINGTON 25, D. C.

January 3, 1952

Section 608, Rental Housing, Letter No. 214, Section 207, RH-142, Title VIII, Military Housing, Letter No. 20.

To: Directors of All Field Offices

SUBJECT: Furniture Rentals and Transient Occupancy

Reference is made to Section 207 Letter RH-136, Section 608 Rental Housing Letter No. 210, and Title VIII Military Housing Letter No. 14, issued August 10, 1951, regarding the establishment of maximum rents and charges in rental housing projects.

Those letters stated that the objective of FHA in its rental housing program is the production of housing designed and operated for relatively permanent occupancy and that transient occupancy is contrary to FHA policy. Those letters also provided formulae for the establishment of maximum rents for living units and a formula for furniture rentals if the mortgagor provides furniture. It was further stated that charges by a mortgagor against tenants in addition to those approved by FHA would not be permitted, and that no approval would be granted for charges for services or facilities not contemplated at the time of processing without the prior approval of this office.

There has now been received at Washington evidence that some mortgagors are catering to transient occupancy, engaging in operations approximating those of a hotel or motel, and in some such instances there is evidence of violation of approved ceiling rents and charges.

It is obvious, of course, that transient occupancy is not feasible in a rental housing project unless living units are furnished. It is also apparent in most of the cases in question that an operation involving transient occupancy

is not economically feasible unless charges are made against occupants in addition to the rents and charges approved by FHA.

In view of the foregoing, it is necessary to supplement and expand the instructions contained in the administrative letters hereinbefore cited.

Effective upon receipt of this letter, no approval will be granted for furniture rentals in any rental housing project unless the Director, after analysis appropriate to the particular case, is firmly of the opinion that furniture is essential to obtain satisfactory occupancy, and approval of furniture rentals will ge given then only in the event of prior agreement by the mortgagor not to accept any tenancy for a period of less than 30 days. The agreement of the mortgagor shall be in the form of a letter addressed to the Commissioner in accordance with the exhibit attached hereto. The original and an executed duplicate copy of such agreement will be ogtained. The original of such agreement will be filed in the field office docket and the executed duplicate copy will be forwarded to the Assistant Commissioner, Rental Housing, Washington, with a copy of the letter of approval.

464 If approved, furniture rentals shall not be in excess of those prescribed in the administrative letters hereinbefore cited, and in the establishment of such rentals there shall be considered only basic items of furniture necessary for comfortable occupancy (as distinguished from complete living facilities), as prescribed in said administrative letters.

Cases involving transient occupancy and probable violation of FHA approved rents and charges, of which this office is apprised, are not numerous but are sufficient in number to warrant vigilance on the part of each Director with respect to rental housing projects in his jurisdiction in which rents and charges are subject to control by FHA to prevent operations in violation of policy as expressed in this letter. If, therefore, a Director is or hereafter becomes aware of operations in any such rental housing project involving transient occupancy, he will immediately require submission by the mortgagor of a current schedule of all rents and charges against tenants or occupants. In examining such schedule, the Director will bear in mind that any charge in addition to those approved by FHA

made against tenants by the mortgagor or by the owners or representatives of the mortgagor, either by themselves personally or through entities controlled by them, constitutes a violation of the approved maximum rents and charges. Upon discovery of any such violation, the Director will immediately notify this office with detailed information regarding the case in order that appropriate instructions may be issued. If upon examination of the schedule submitted the Director is of the opinion that such schedule does not truly reflect the rents and charges actually being made by the mortgagor, or if such schedule be in conflict with other evidence available to the Director of rents and charges actually being made, the Director will notify this office with full information regarding the case in order that appropriate instructions may be issued.

Very truly yours,

CLYDE L. POWELL,
Assistant Commissioner.

Attachment
103166
465

COMMISSIONER'S CLEARANCE NO. *2489*

_____
(DATE)

To: Federal Housing Commissioner
Washington, D. C.

Re: (Identify project by name, number and location)

The above-identified rental housing project is subject to a mortgage insured by you under the provisions of the National Housing Act and all rents and charges of any nature against tenants of said project are subject to your approval.

The undersigned proposes to furnish certain living units in the project and to make a monthly charge for such furniture, all as shown by the schedule of furniture rentals attached hereto, which monthly charge for furniture will be in addition to the maximum monthly rent for unfurnished living units you are being requested to approve or which you heretofore have approved.

The undersigned represents to you and agrees that if furniture rentals as proposed are approved or are approved in any other amounts, no tenants for the project

will be accepted for any period of tenancy of less than thirty (30) days.

Very truly yours,

_____

(MORTGAGOR)

By _____

(TITLE)

103167

466 **Defendant's Exhibit No. 6**

AFFIDAVIT

DISTRICT OF COLUMBIA,
CITY OF WASHINGTON, SS:

ADOLPHUS M. PROTHRO, being first duly sworn, deposes and says:

1. That he has been employed by the Federal Housing Administration since November 1934; that he joined the staff of the Legal Division in 1937; that he has remained in the Legal Division since that date to the present time; that he has served as Director of the Legal Division since August 1954; that he is now Acting General Counsel for the Federal Housing Administration.

2. That it has been the duty of the Legal Division to interpret and to implement the National Housing Act; that the Federal Housing Administration has interpreted the language "principally designed for residential use" to:

(a) Allow the insurance of residences in which such professional people as doctors, dentists, chiropractors, etc. might establish an office, and

(b) Allow the insurance of multifamily housing projects in which commercial facilities catering to the needs of resident families were allocated.

3. That the Federal Housing Administration has never interpreted the word "principally" in the aforesaid quoted language to permit the use of a portion of the dwellings for transient accommodations.

ADOLPHUS M. PROTHRO.

Subscribed and sworn to before me this 22nd day of September, 1955. My Commission Expires July 31, 1958.

RUTH M. BOLLIE,
Notary Public.

(SEAL)

467 **Defendant's Exhibit No. 8**

EA

December 5, 1952

Mr. T. E. Steadman, Secretary
The Darlington, Inc.
P. O. Box 462
Charleston, South Carolina

Re: Project No. 054-42030, The Darlington, Charleston, S. C.

Dear Mr. Steadman:

It has come to our attention that apartments in the above captioned project are being rented furnished and inasmuch as our files do not reveal that we have ever been requested to approve a rental covering this furniture, which is in excess of the shelter rental previously approved by us, it will be necessary that we be advised as to the number of apartments being rented furnished and a cost breakdown of the furniture. Please be advised that consideration will only be given to such basic items of furniture as rugs, chairs, sofas, beds, bureaus, etc., necessary for comfortable occupancy as distinguished from such items as linens, china, cutlery, or similar items necessary for complete living accommodations.

In connection with the approval of furniture rentals, our instructions from Washington provide that no approval will be granted for furniture rentals in any rental housing project without prior agreement by the mortgagor not to accept any tenancy for a period of less than thirty days, the agreement to be in the form of the enclosed letter addressed to the Commissioner and returned to this office in duplicate, along with the information requested above.

Very truly yours,

Enclosure
CWL/eww

W. W. ADICKES,
Director.

468 Defendant's Exhibit No. 9

AD
May 3, 1954

Mr. Leonard L. Long, Vice President
The Darlington, Inc.
P. O. Box 288
Charleston, South Carolina

Re: Project No. 054-42030, The Darlington,
Charleston, South Carolina

Dear Mr. Long:

Please accept our thanks for the Rental Housing Occupancy Report which was received recently on the shelter project.

From the Occupancy Report, we are unable to determine the actual amount of shelter rentals charged. Further, this Administration has never approved any furniture rentals and in this connection it will be necessary that we be furnished a cost breakdown of the furniture in each type apartment. Consideration will only be given to such basic items of furniture as rugs, chairs, sofas, beds, bureaus, etc., necessary for comfortable occupancy and not to items such as linens, china, cutlery, etc., necessary for complete living accommodations.

No approval will be granted for furniture rentals without prior agreement by the mortgagor not to accept any tenancy for a period of less than thirty days, the agreement to be in the form of the enclosed letter addressed to the Commissioner and returned to this office, in duplicate, along with the information requested above.

Your prompt reply will be most appreciated.

Very truly yours,

W. E. Moore,
Director.

Enclosures
ew

469 **Defendant's Exhibit No. 10**

FEDERAL HOUSING ADMINISTRATION
WASHINGTON 25, D. C.

August 10, 1951

Section 608, Rental Housing, Letter No. 210, Section 207, RH-136.

To: Directors of All Field Offices.

SUBJECT: Establishment of Maximum Rents and Charges in Projects Operating Under Sections 207, 608, and Title VIII.

This letter is for the purpose of clarifying procedures and coordinating policies with respect to the approval of rent schedules in rental projects involving mortgages insured under Sections 207, 608 or Title VIII, in which ceiling rents are subject to control by the Commissioner.

Prior to occupancy of a project the Director of the field office with jurisdiction is authorized and required to approve the initial rent schedule or revisions thereof as hereinafter provided. Subsequent to first occupancy any increase in a rent schedule requires the concurrence of this office.

In establishing a rent schedule with respect to a particular project it is necessary that the Director consider the section of the Act under which the mortgage is insured and the amortization rate required by the terms of the insured mortgage. In Section 608 and Title VIII cases net return, calculated as hereinafter provided, shall not exceed 6½%. In Section 207 cases such net return shall not exceed 7%, or 7½% in those Section 207 cases in which the terms of the mortgage require amortization by level principal payments at the rate of 2½% per annum.

The Director may approve a rent schedule which at 93% occupancy (on the basis of FHA estimates as revealed by the applicable Form 2264W or 2264) will yield the appropriate net return on the actual estimated replacement cost of the residential portion of the project (including garages and land) plus required working capital. If the project contains commercial property, the net return thus established will be calculated after elimination from the esti-

mated operating cost, taxes, and replacement reserve requirements, that portion of those expenses attributable to the commercial portion of the project. This elimination will be pro-rata on the basis of the ratio of the cost of the commercial portion of the project to the residential portion. In the discretion of the Director, such approval may be granted even though in Underwriting processing lesser rents have been determined as appropriate for the purpose of establishing maximum insurable mortgage amount.

Rents for commercial space are subject to approval but it is not necessary that a ceiling be established on rents for commercial space. The Director must determine, however, that the rents proposed for such space are sufficiently in accord with those anticipated in processing to represent an economically sound rent for such space.

In the event that during the course of construction there has been an increase in replacement cost over the estimated replacement cost as revealed in the applicable Form 2264W or 2264, or if subsequent to preparation of such form it has been determined that an increase in the estimate of operating cost or taxes is justified, such increase or increases may be considered by the Director in establishing the rent schedule but may be considered only in the event of substantiation thereof by relevant, pertinent, and convincing evidence satisfactory to the Director, concurred in by the Chief Underwriter, and on file in the Washington Docket.

With respect to projects involving mortgages insured under Title VIII, the Director must, in addition to making the determinations heretofore required, also obtain from the military esablishment with jurisdiction approval of the rent schedule if such schedule provides for rents in excess of those previously agreed upon with the military establishment.

If the mortgagor is to provide furniture, a furniture rental may be established which will amortize the actual cost of the furniture in not less than 48 months, the monthly furniture rental to be fixed at not more than 1/48th of actual cost as determined by pertinent, documentary evidence substantiating such cost. In establishing the furniture rental consideration will be given only to such basic

items of furniture as rugs, chairs, sofas, beds, bureaus, etc., necessary for comfortable occupancy, as distinguished from such items as linens, china, cutlery, or similar items, necessary for complete living accommodations.

No charge shall be made by the mortgagor against tenants in addition to those established by a rent schedule approved in accordance with the foregoing formulae, nor shall the owners or representatives of the mortgagor, either by themselves personally or through entities controlled by them, be permitted by way of subterfuge or otherwise to make additional charges against tenants with respect to facilities or services provided at the project. If tenants desire services in addition to those contemplated in the establishment of the rent schedule they are expected to make arrangements for the same independently and on their own behalf.

Any charge for any facilities or services to be provided by the mortgagor not contemplated at the time of processing requires the approval of this office. Any proposal for charges other than those contemplated at the time of processing, if the Director is of the opinion the proposal is sufficiently meritorious to warrant consideration, will be forwarded to this office with supporting information and the Director's recommendations.

Prior to occuppancy and at a time sufficiently in advance thereof to permit possible necessary negotiation and adjustment, the Director will require the mortgagor to submit the proposed rent schedule in triplicate on Form 2458 (Rental Schedule and Information on Rental Project), such form to be completed with respect to the rent schedule and other information required thereby. The Director will determine that the proposed schedule reveals monthly rents to be charged for all units. Prior to approval the Director will determine that the rents proposed are not in
471 excess of those permitted by the formulae above prescribed.

Approvals of rent schedules will be in writing. The approval will reveal the number of rooms in the project and the approved average rent per room per month. Copies of approvals shall be distributed as follows:

Original to mortgagor,
Copy to Assistant Commissioner, Rental Housing, with copy of completed Form 2458,
Copy to Washington Docket, with copy of completed Form 2458,
Copy to Duplicate Docket, with copy of completed Form 2458.

Subsequent to first occupancy any increase in a rent schedule requires the concurrence of this office. Consideration will be given to increases only when it is demonstrated that a substantial increase in operating cost, taxes, or other charges has occurred, or is reasonably to be anticipated. The increase, however, must be based upon the fact that the present income of the project will no longer produce the appropriate net return. Upon receipt of a request for an increase in rents subsequent to occupancy at a project involving a mortgage insured under Title VIII, the Director will require prior to consideration thereof submission by the mortgagor of written evidence of concurrence in the request by the military establishment with jurisdiction.

In cases in which it is discovered that rents exceed the limitations herein set forth and the Director is unable for a period of 30 days to obtain from the mortgagor necessary adjustments, the Director will forward to this office all pertinent facts respecting the case for further instructions.

In considering rent schedules and methods of operation proposed by mortgagors, Directors will bear in mind that the objective of this Administration is the production of housing designed for occupancy of a relatively permanent nature and that transient occupancy is contrary to policy. No approval will be granted with respect to a proposal anticipating transient occupancy.

This letter supersedes and cancels Section 608 Rental Housing Letters 145, 157, 162, 194, and Section V, Paragraph 10, of Section 207 RH Letter 123.

Very truly yours,

CLYDE L. POWELL,
Assistant Commissioner.

101120 COMMISSIONER'S CLEARANCE No. *2316*

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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL HOUSING ADMINISTRATION, APPELLANT

v.

THE DARLINGTON, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No.

FEDERAL HOUSING ADMINISTRATION, APPELLANT

v.

THE DARLINGTON, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge court, entered July 13, 1957 (App. A, *infra*, pp. 21-24), is reported at 154 F. Supp. 411. The opinion of District Judge Hoffman, dated June 20, 1956, incorporated by reference in the opinion of the three-judge court (App. B, *infra*, pp. 25-50), is reported at 142 F. Supp. 341. Other earlier opinions in this litigation are reported at 352 U.S. 977 and 134 F. Supp. 337.

JURISDICTION

This suit, brought under the National Housing Act, as amended, and under 28 U.S.C. 2201-2202, asks for declaratory and injunctive relief determining that, notwithstanding Section 513 of the Act, added in 1954,

68 Stat. 610, 12 U.S.C. (Supp. IV) 1731b, appellee has the right to rent apartments in its building for terms of less than thirty days. The complaint alleged that application of the 1954 Act to appellee would be unconstitutional. The United States District Court for the Eastern District of South Carolina, composed of three judges, held in its opinion of July 13, 1957 (App. A, *infra*, pp. 21-24), that the statute was unconstitutional as applied to appellee. The judgment of the district court (App. C, *infra*, pp. 51-53) was entered on September 5, 1957 and the Federal Housing Administration filed its notice of appeal in that court on October 2, 1957.

The jurisdiction of this Court to review the judgment of the three-judge district court on direct appeal is conferred by 28 U.S.C. 1253 and is sustained by the following cases: *Swift & Co.* v. *United States*, 343 U.S. 373, 376, and *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 567-568.

STATUTES INVOLVED

The pertinent statutes, *viz.*, Sections 608 and 513 of the National Housing Act, as amended (56 Stat. 303, 12 U.S.C. 1743, and 68 Stat. 610, 12 U.S.C. (Supp. IV) 1731b), are set forth in Appendix D, *infra*, pp. 54-59.

QUESTIONS PRESENTED

By insuring a mortgage, appellant, the Federal Housing Administration, enabled appellee to finance and construct a building in 1949. This insurance took place pursuant to legislation which aimed to promote the construction of residential rental housing, first for war workers, later for returning veterans. The regulations issued under the statute required that the insured project be designed principally for residential

use, and they referred to apartments in such projects as dwelling units. In its charter, appellee undertook to restrict itself to the business of operating a rental housing project, and it referred to apartments in the project as dwelling units. After the completion of the project, appellee rented some of its apartments as furnished overnight accommodations for transients. The Housing Act of 1954 explicitly prohibited such rentals, regardless of whether the project was completed before or after the passage of that Act.

A district court of three judges held that the Housing Act of 1954 was unconstitutional to the extent that it prohibited rental to transients in projects theretofore approved by appellant, and ruled that appellant had no right to prohibit such rental.

The questions presented are:

1. Whether appellee's rental of apartments to transients was prohibited prior to the Housing Act of 1954, in view of the purpose of the earlier legislation and the nature of appellee's undertaking to limit its business to a rental housing project consisting of dwelling units.

2. Whether the explicit prohibition of the 1954 Act was beyond the power of Congress, as applied to a project theretofore approved.

STATEMENT

Appellee is the owner of an apartment house located in the City of Charleston, South Carolina. Appellant made the construction of the project possible by insuring the mortgage of the building under Section 608 of the National Housing Act. This litigation involves appellee's right to rent apartments to transients, *i.e.*, for periods of less than thirty days. In setting forth the

legal issues involved, we shall include a brief discussion of the pertinent legislative background.

A. *The Development of Section 608 of the National Housing Act*

Section 608 was added to the National Housing Act by the National Housing Act Amendments of 1942, Section 11, 56 Stat. 303. Its purpose was to facilitate the construction of rental residential housing for war workers by authorizing the insurance of mortgages on construction projects [1] where "[t]he mortgaged property [was] designed for rent for residential use by war workers".[2]

The housing problems of war workers ended with the termination of the hostilities; at the same time, however, there arose the need to house the returning veterans.[3] The Veterans' Emergency Housing Act of 1946, Section 10(f) (60 Stat. 214), continued the authority to insure mortgages under Section 608. Subsection (b) (2) (App. D, *infra*, p. 55), however, was amended to read:

> Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families, and for hardship cases as defined by the Commissioner, shall be provided under such regulations

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[1] Cf. the explanation in the House of Representatives by Mr. Steagall, the author of the Committee Report, at 89 Cong. Rec. 2145: "The purpose of the legislation * * * is to permit the insurance of residential construction in defense areas."

[2] Section 608(b)(2). See also H. Rept. No. 2039, 77th Cong., 2d Sess., p. 2; S. Rept. No. 1300, 77th Cong., 2d Sess., p. 2.

[3] Cf. the statement of policy in Section 1 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207.

and procedures as may be prescribed by the Commissioner.

Subsequent legislation restated the congressional understanding that the authority under Title VI of the National Housing Act (including the insurance of mortgages pursuant to Section 608) was designed to assist in the construction of residential housing. The Act of December 27, 1947, Section 2, 61 Stat. 945, declares that "Title VI of the National Housing Act, as amended, shall be employed to assist in maintaining a high volume of new *residential construction* without supporting unnecessary or artificial costs. * * *" (Emphasis added.) In a similar vein, Section 101 of the Housing Act of 1948[4] provides that no mortgage shall be insured under Section 608 unless the mortgagor certifies under oath that he will not discriminate against families with children.

24 CFR 280.34, issued by appellant pursuant to statutory authority (Section 607 of the National Housing Act), has provided since 1947:[5]

> At the time the mortgage is insured the mortgagor shall have constructed and completed or shall be obligated to construct and complete new housing accommodations on the mortgaged property *designed principally for residential use,* conforming to standards satisfactory to the Commissioner and consisting of not less than eight (8) *rentable dwelling* units on one site and may be detached, semi-detached, or row houses, or multiple-family structures. [Emphasis added.]

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[4] 62 Stat. 1268, 12 U.S.C. 1738.

[5] 12 F.R. 8813, 8817. 24 CFR 280.34 was originally designated 24 CFR 580.34. It was renumbered 24 CFR 280.34 on December 23, 1948, 13 F.R. 8260.

Appellant has interpreted the language "designed principally for residential use" as permitting rental to offices and stores designed to serve the permanent residents of a project, but not as authorizing rentals to transients.[6]

B. *The Housing Act of 1954*

During the hearings before the Banking and Currency Committees of both the House of Representatives and the Senate, which preceded the passage of the Housing Act of 1954 (68 Stat. 590), representatives of the hotel industry complained that many projects built with the aid of federal mortgage insurance pursuant to Section 608 had been converted into residential hotels or were taking in transients in competition with the hotel industry.[7] The House Committee took the posi-

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[6] Cf. the testimony of Adolphus M. Prothro, Director of the Legal Division of the Federal Housing Administration, in the court below:

> Q. In your affidavit you state that it is the duty of the Legal Division to interpret the Act and that the Federal Housing Administration has interpreted the language "principally designed for residential use" to mean or to:
>
> a. allow the insurance of residences in which professional people as doctors, dentists, chiropractors, etc., might establish an office, and
>
> b. allow the insurance of multifamily housing projects in which commercial facilities catering to the needs of resident families were allocated [sic].
>
> And in Paragraph 3 you state that the Federal Housing Administration has never interpreted the word "principally" to permit the use of a portion of the dwellings for transient accommodations; is that correct?
>
> A. Yes, sir.

[7] Hearings before the Committee on Banking and Currency, House of Representatives, 83d Cong., 2d Sess., on H.R. 7839, pp. 507-515; Hearings before the Committee on Banking and Currency, United States Senate, 83d Cong., 2d Sess., on S. 2889, 2938, 2949, pp. 654-661.

tion that FHA insurance was designed to "provide rental accommodations for family use," not to cover hotels, and that the "fact that a project has been insured should therefore be a prohibition to rental on a transient basis." The Committee did not believe, however, that remedial legislation was required. Instead, it called upon FHA to "take firm action to obtain full compliance with such contracts as have been imposed for this purpose in those contracts, making such investigation and taking such other enforcement action as may be required". See H. Rept. No. 1429, 83d Cong., 2nd Sess., pp. 17-18.

The Senate Committee (S. Rept. No. 1472, 83d Cong., 2d Sess., pp. 30-33) also took the position that the complaints of the hotel industry were justified. It stated that "the benefits provided under the National Housing Act were designed to increase the supply of permanent residential housing, not to increase the supply of hotels or motels or similar establishments catering to non-permanent residents." In contrast to the House Committee, the Senate Committee (and subsequently the Senate) felt that it was desirable to "clarify the intent of Congress" by specific legislation. In conference, the House agreed in principle with the position taken by the Senate (H. Rept. No. 2271, 83d Cong., 2d Sess., pp. 77-78).

As finally enacted, Section 132 of the Housing Act of 1954 (68 Stat. 610) added a new Section 513 (12 U.S.C. 1731b (App. D., *infra*, pp. 55-59) to the Housing Act. Subsection (a) declares that since the enactment of the National Housing Act it has been the intent of Congress "that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes

the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." Subsection (b) provides that no new, existing, or rehabilitated multifamily housing, a mortgage of which is insured under the Act, shall be operated for transient or hotel purposes[8] except where such use has been authorized expressly prior to May 28, 1954, or where the building is located in an area designated to be a resort area. Under subsections (d), (f), and (g), the Commissioner of the Federal Housing Administration is "authorized and directed to enforce the provisions of this section [Section 513] by all appropriate means at his disposal."[9] Under subsection (h), the Attorney General may obtain injunctive relief against the continuation of a practice violating the statute. Subsection (i) grants the same remedy to any person owning or operating a hotel within fifty miles of the place where such violation occurs.

C. *The Facts Underlying this Litigation*

In 1949, appellee planned to erect a twelve-story multifamily apartment building in Charleston, South Carolina (App. B, *infra*, pp. 25-27, 31). It applied for FHA insurance of a mortgage for $1,357,700 pursuant to Section 608.[10] Initially, the application was rejected because of the objection of certain officials of the Federal Housing Administration to the location of the project.

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[8] *I.e.*, rented for periods of less than thirty days (Section 513(e), App. D, *infra*, pp. 56-57).

[9] If advised in writing of a violation, the Commissioner is to investigate the facts, and if a violation is found to exist he "shall order such violation * * * to cease forthwith". In cases of noncompliance with such order, the matter is to be referred to the Attorney General for civil or criminal action.

[10] The total cost of the project amounted to about $1,676,000 (App. B, *infra*, p. 26).

A subsequent application, however, was pressed and ultimately approved, appellee consenting to the usual conditions required by FHA (App. B, *infra*, p. 26). Accordingly, appellant was given the position of a preferred stockholder, and appellee included in its corporate charter a number of provisions of which the following are here pertinent:

> So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commission *it shall engage in no business other than the construction and operation of a rental housing project or projects.*
>
> * * * * *
>
> *Dwelling accommodations* of the corporation shall be rented at a maximum average rental per room per month fixed by the Board of Directors and approved by the holders of the Preferred Stock [*i.e.*, appellant]. * * * *Dwelling accommodations* of the Corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholder. [App. B, *infra*, pp. 27-30; emphasis added.]

When the project was completed in July 1951, it appeared that appellee Darlington had overestimated the need for rental housing (cf. App. B, *infra*, pp. 26, 32). Ten weeks later, less than one half of the apartments were rented. With funds obtained from its parent—the Long Corporation [11]—appellee furnished

[11] The Long Corporation held 1996 of appellee's 1999 shares of common stock. The Long Corporation, in turn, is solely controlled by L. D. Long (App. B, *infra*, p. 31).

certain apartments (App. B, *infra*, pp. 32-33). Although these furnished apartments originally were rented for periods longer than thirty days, appellee began, in February 1952, to rent them for shorter periods (App. B, *infra*, pp. 32-33). The daily charge for the room was composed of two items, one consisting of one-thirtieth of the maximum average rental for the room and a second larger one for "furniture rent". The latter was paid over to the Long Corporation, appellee's parent.[12] Appellee never applied for the approval by appellant of its schedules for the rental of furnished apartments since appellant had indicated that such approval would be conditioned upon appellee's undertaking not to rent for periods less than thirty days (App. B, *infra*, p. 33).

D. *The Proceedings Below*

Appellant objected to appellee's rental of furnished apartments without an approved rental schedule as early as December 1952. However, it did not force the issue until the passage of the Housing Act of 1954 (App. B, *infra*, p. 33).

In January 1955, appellant demanded that appellee execute an agreement not to accept any tenancy for a period of less than thirty days. When appellee refused to give the undertaking, a demand that the practice cease was issued on January 18, 1955 (App. B, *infra*, pp. 33-34). Appellee thereupon filed a complaint on February 9, 1955, and an amended complaint on March 10, 1955 (R. 2), in which it asked for a declaratory judgment stating the respective rights between the

[12] The district court found that, if the daily charge was $6.00, $2.58 would be allocated to "rent" and $3.41 to "furniture rent" (App. B, *infra*, pp. 35-37).

parties (in particular, that appellee has the right to rent apartments for terms of less than thirty days), for an order enjoining appellant from interfering with appellee's operation of the apartment house, and for a preliminary injunction.

The gravamen of the complaint is that appellee had a vested right to rent its apartments for periods of less than thirty days prior to the enactment of the Housing Act of 1954, and that the 1954 Act could not constitutionally deprive it of that property right. Appellee also asserted that the statute was discriminatory, arbitrary, unjust, and inequitable in view of the provisions (a) authorizing rentals to transients in resort areas and (b) permitting hotels to obtain injunctions against practices violating the statute.

Appellant filed a cross-complaint asking for an order enjoining appellee (a) from renting any accommodations for any term less than thirty days; (b) from charging rent in excess of the schedule approved by the Commissioner; (c) from renting furnished apartments and supplying services without the written approval of the Commission; and (d) from advertising or holding out transient or guest accommodations. A three-judge court was convened pursuant to 28 U.S.C. 2282 because the complaint alleged that Section 513 was unconstitutional, but that court dissolved itself on the ground that the case could be determined without reaching the constitutional issue (cf. *The Darlington, Inc.* v. *Federal Housing Administration,* 134 F. Supp. 337).

Thereafter, Judge Hoffman, sitting as a single judge, held that Darlington had had the right to rent apartments to transients prior to 1954, and that Congress

lacked the power "to create a new obligation with respect to a past transaction" (App. B, *infra*, p. 43). He also held that the 1954 Act was discriminatory in view of the resort-area exception (App. B, *infra*, pp. 47-48).

Upon direct appeal, pursuant to 28 U.S.C. 1252, this Court noted probable jurisdiction, reversed Judge Hoffman's judgment on the ground that under 28 U.S.C. 2282 an injunction restraining the enforcement of an Act of Congress for repugnance to the Constitution cannot be granted by a single district judge, and remanded the cause for consideration by a three-judge district court (*Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977).

After this remand, a three-judge district court adhered to the opinion of Judge Hoffman and incorporated it by reference (App. A, *infra*, p. 22). It observed, in addition, that, in the case at bar, the renting to transients of a relatively small number of apartments which could not be rented otherwise did not interfere with the purpose of the Act to provide housing for veterans of World War II, and that the Federal Housing Administration could not have prohibited it prior to 1954 (App. A, *infra*, pp. 22-24).

The order of the three-judge court (App. C, *infra*, pp. 51-53) declares that Darlington has the right to lease a reasonable number of apartments for terms of less than thirty days and that the Federal Housing Authority may not prohibit such rentals to transients provided that they do not preclude the rental of housing accommodations to veterans of World War II. The Federal Housing Administration is enjoined from conditioning any approval of changes in rent schedules upon Darlington's agreement not to rent to transients.

Darlington is prohibited from advertising or otherwise soliciting the business of rental to transients or from providing food, beverage or bell-boy service.

This appeal followed.[13]

THE QUESTIONS ARE SUBSTANTIAL

1. The court below has held provisions of the Housing Act of 1954 unconstitutional as applied to situations which Congress expressly sought to cover. On the basis of this constitutional determination, the decree orders FHA to approve schedules for the rental of furnished apartments by appellee without regard to the statutory command that the minimum rental period be no less than thirty days. The agency is, indeed, enjoined from insistence upon compliance with this express requirement. The court, moreover, reached this result in the face of the solemn declaration of Congress, appearing in the 1954 Act, that its intent in enacting the National Housing Act, in its original form and as amended, had been to exclude the use of insured housing for transient or hotel purposes.

The decision thus nullifies, with respect to projects insured prior to the effective date of the Housing Act of 1954, the flat congressional prohibition against the rental of insured residential housing to transients. The practical consequences of such a holding are broad. Prior to 1954, FHA had insured 7,068 projects pursuant to Section 608. These projects embrace some 470,000 rental units. FHA has found numerous instances of violation of the kind involved in the instant case. Fourteen such cases have been referred to the Department of Justice and a considerably larger num-

[13] Darlington has filed a cross-appeal.

ber are currently under investigation by the housing authorities.

2. The ruling of the district court, *i.e.*, that Congress lacks the power to prohibit the renting of accommodations for terms of less than thirty days in projects approved prior to 1954, is predicated upon its conclusion that appellee had the right to rent to transients before the passage of the 1954 Act. If this premise is wrong, no constitutional question need be reached. Accordingly, we address ourselves first to the question of whether such rentals were permissible prior to 1954.

a. Renting to transients was prohibited prior to the passage of the Housing Act of 1954. The district court disregarded the formal congressional declaration that the purpose of enacting the National Housing Act was to preclude the use, for transient and hotel purposes, of houses built with the aid of insured mortgages. While such a declaration may not be conclusive on the courts, it is certainly entitled to great respect. *United States* v. *Stafoff*, 260 U.S. 477, 480; *First National Bank* v. *Missouri*, 263 U.S. 640, 658-659; *Bailey* v. *Clark*, 21 Wall. 284, 288; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331.

Here, the declaration is supported by an examination of the statute involved. The unmistakable purpose of Section 608 has been to furnish residential housing—originally to war workers (*supra*, p. 4), later to returning veterans (*supra*, p. 4). Throughout that section and the statutes amending it, one finds expression of a single dominant aim: facilitating residential construction for families. The court below concedes that this was "the primary intent of Congress" (App. B, *infra*, p. 42). The notion of renting such residen-

tial construction to transients, or using it as a hotel, is repugnant to this underlying purpose.

While the pre-1954 legislation did not in terms prohibit such a diversion, a consideration of the statutory purposes just discussed (see also, *supra*, pp. 4-5), of the regulation issued by FHA under Section 607 of the National Housing Act, *supra*, pp. 5-6, and of the terms of appellee's own undertaking, required by Section 608(b)(1) (*supra*, p. 9), leads to the conclusion that appellee did assume the duty to rent its facilities for residential purposes only.

The pertinent regulation—24 CFR 280.34—requires that the project be *designed principally for residential use* and that it consist of not less than eight *rentable dwelling units* (*supra*, p. 5). As stated above (p. 6), the term "principally for residential use" was not intended by FHA to authorize the rental of a small portion of the project for short terms; it was designed to permit the inclusion in a project of facilities which would accommodate the needs of permanent residents, *e.g.*, professional offices and stores.[14] The regulation refers to apartments as "dwelling" units, a term inconsistent with the view that rentals to transients were contemplated.[15]

In its charter, appellee assumed the obligation to limit its rentals to permanent residents. Appellee

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[14] See also S. Rept. No. 1472, 83d Cong., 2d Sess., p. 31.

[15] The word "dwelling" denotes a permanent residence. *United States* v. *Tod*, 297 Fed. 385, 393 (C.A. 2). It "involve[s] the idea of a house, a residence, where persons live in a settled abode", *Barnett* v. *Vaughan Institute*, 134 App. Div. 921, 119 N.Y.S. 45, 46. Consequently, it is well established that a hotel or other place of mere temporary lodging is not a dwelling. *Thomas* v. *Commercial Union Assur. Co.*, 162 Mass. 29, 33; *People* v. *D'Oench*, 111 N.Y. 359, 361; *DeWolf* v. *Ford*, 193 N. Y. 397, 402.

agreed unconditionally that it would engage in no business other than the operation of a *rental housing project. Prima facie,* rental to transients does not constitute rental housing. The charter also refers to the apartments as "dwelling accommodations", which again emphasizes the long-term residential character of the project. The clause providing that appellee's dwelling accommodations could not be rented for a period in excess of three years without appellant's consent does not mean, as the court below concluded (App. B, *infra,* p. 32), that rental for *any* shorter period was permissible. Such a reading overlooks the requirement that the apartments had to be rented as *dwelling accommodations, i.e.,* for non-temporary purposes. The fact that the maximum average rental is to be fixed on a monthly basis (*supra,* p. 9) is similarly indicative of a general understanding that the apartments would be rented on at least a monthly basis.

Thus, beginning in 1947,[16] long before appellee's project was approved by the Federal Housing Administration,[17] the Federal Housing Administration construed the statute as prohibiting rental for non-dwelling purposes, *i.e.,* to transients. This administrative interpretation of the statute is entitled to great weight. Indeed, it could be overturned only if the statutory test were so plain and unambiguous "as to leave nothing for construction". *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315; *United States* v. *American Trucking Associations,* 310 U.S. 534, 549; *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, 275; *United States* v. *Citizens Loan Co.,* 316 U.S. 209;

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[16] *Supra,* p. 5.

[17] *I.e.,* December 30, 1949, App. B, infra, p. 31.

Colgate Co. v. *United States*, 320 U.S. 422, 426; *Billings* v. *Truesdell*, 321 U.S. 542, 552-553; *Roland Co.* v. *Walling*, 326 U.S. 657, 676; *United States* v. *Henning*, 344 U.S. 66, 77; *United States* v. *Public Utilities Commission*, 345 U.S. 295, 314-315; *United States* v. *Zucca*, 351 U.S. 91, 96. That is not the case here.

Moreover, the National Housing Act, particularly Title VI dealing with War and Veterans Housing Insurance, was amended continuously during the years following the establishment of this administrative interpretation.[18] The legislative history of those enactments shows that Congress was fully aware of the administrative practice of the Federal Housing Administration. In these circumstances, the repeated extension and amendment of the statute[19] constitute express approval and ratification by Congress of the administrative interpretation and practice.[20]

The 1954 Act thus did not change the law, nor did it retroactively impose any new duties upon appellee. It directed appellant to enforce strictly the law as it theretofore existed, and it provided added remedies for that purpose. This certainly was within the power

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[18] The historical note to 12 U.S.C. 1738 shows that that section was amended three times in 1947, twice in 1948, four times in 1949, and once in 1950.

[19] It should be noted that most of these amendments were enacted prior to December 30, 1949, the date of the approval of the Darlington project (App. B, *infra*, p. 31).

[20] *United States* v. *Allen-Bradley Company*, 352 U.S. 306, 308-311; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 53; *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 544-549; *Shapiro* v. *United States*, 335 U.S. 1, 6; *Commissioner* v. *Flowers*, 326 U.S. 465, 469; *Helvering* v. *Winmill*, 305 U.S. 79; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 310-315; *Hecht* v. *Malley*, 265 U.S. 144, 153; see also *Brooks* v. *Dewar*, 313 U.S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 118-119; *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 509 (C.A. D.C.), certiorari denied, 350 U.S. 1002.

of Congress. *Ex parte Collett*, 337 U.S. 55, 71; *Crane* v. *Hahlo*, 258 U.S. 142.

b. ***Congress has the power to prohibit the rental to transients in projects approved prior to the passage of the Housing Act of 1954, even if it be assumed, arguendo, that such practices were not illegal prior to 1954.*** The Constitution does not, of course, prohibit retrospective legislation in the civil field. *Calhoun* v. *Massie*, 253 U.S. 170; *Louisville & Nashville R. R.* v. *Mottley*, 219 U.S. 467. Moreover, the prohibition against impairing the obligation of contracts (Art. I, Section 10, cl. 1) is in terms limited to State action. This Court has pointed out that "when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity", *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U.S. 240, 307-308, and that a person who contracts in an area in which the legislature had exercised its power must expect further legislation on the same subject. *Veix* v. *Sixth Ward Assn.*, 310 U.S. 32, 38.

Nor does the circumstance that the United States is a party to a contract destroy the congressional power to modify the contract. *Lynch* v. *United States*, 292 U.S. 571 and *Union Pacific Ry.* v. *United States*, 99 U.S. 700, cited by the court below, do not hold to the contrary. *Lynch* v. *United States* recognized that Congress can annul or amend contractual relations of the United States in proper circumstances, but held that the naked desire to save money did not constitute an adequate justification, 292 U.S. at 579-580. In *Union Pacific*, this Court upheld the congressional modification of a contract to which the United States was a party; it did the same, in substance, in *North*

American Commercial Co. v. *United States,* 171 U.S. 110, and *Horowitz* v. *United States,* 267 U.S. 458, 461.

As the court below recognized, rentals to transients conflicted with "the primary intent of Congress" (App. B, *in, ra,* p. 42). While that court nonetheless found that such rentals were not effectively prohibited by the prior law, and also concluded that they were consistent with Federal Housing Administration regulations and with appellee's charter, this much is clear:—rentals to transients violated the spirit of the statute and were, at the least, of questionable standing. In such circumstances, a congressional clarification of the law—one which insists upon compliance with its manifest purpose and expressly prohibits practices which were at best dubious—is neither arbitrary nor unreasonable. *United States* v. *Hudson,* 299 U.S. 498, 501; *Veix* v. *Sixth Ward Assn.,* 310 U.S. 32, 38; *Milliken* v. *United States,* 283 U.S. 15, 22-24; *Lichter* v. *United States,* 334 U.S. 742, 788-789; *Blanchard* v. *Reconstruction Finance Corporation,* 177 F. 2d 727, 729-730 (C.A. D.C.), certiorari denied, 339 U.S. 912. The 1954 Act, in short, impaired no legitimate rights or expectations;[21] it demanded, rather, that those who had received valuable financial assistance from the Government, for the purpose of

[21] Appellee knowingly incurred a risk when it insisted upon the construction of the Darlington project in spite of the misgivings of the Federal Housing Administration (*supra,* pp. 8-9), and again when it decided to rent its facilities to transients in spite of the regulations issued by appellant and the obligations undertaken by it in its own charter. Appellee plainly has no constitutional right, nor any vested interest, in being saved harmless from this risk.

constructing residential housing, operate the housing in faithfulness to that purpose.[22]

CONCLUSION

The questions presented are of substantial importance and this Court should note probable jurisdiction of the appeal.

Respectfully submitted,

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GEORGE COCHRAN DOUB,
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Attorneys.

NOVEMBER 1957.

[22] The added suggestion by the district court (App. B, *infra*, pp. 47-48) that the 1954 Act is discriminatory because of the resort-area exception has no substance. Congress could reasonably decide that strict prohibition of use for transient purposes was not desirable in resort areas because that might cause undue hardships for tourists. In any event, this appellee is not adversely affected by the exception and has no standing to challenge it.

APPENDIX A

(OPINION OF THREE-JUDGE COURT)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

CIVIL ACTION No. 4741

THE DARLINGTON, INC., PLAINTIFF,

v.

FEDERAL HOUSING ADMINISTRATION, DEFENDANT

Before Haynsworth, Circuit Judge, and Timmerman and Hoffman, District Judges.

J. C. Long, H. H. Higgins, Jr., and William Grant, for Plaintiff, Arthur G. Howe, Assistant United States Attorney, and Carl Eardley, Special Attorney, Department of Justice, for Defendant.

PER CURIAM:

In this declaratory judgment proceeding, plaintiff, the owner and mortgagor of a twelve-story multifamily apartment building financed under the provisions of Title VI, sec. 608, of the National Housing Act, seeks a declaration of its rights to lease certain apartments in said project for periods of less than 30 days.

When the action was originally presented to District Judge Hoffman, sitting by designation, the District Judge requested that a three-judge court be convened because injunctive relief was asked to restrain an Act of Congress passed in 1954 [1] on the ground that it was

[1] Housing Act of 1954, Public Law 560, 83rd Congress, Chapter 649, 2nd Session, H. R. 7839, 12 U.S.C.A. § 1731(b).

unconstitutional. The three-judge court, in a per curiam opinion reported in 134 F. Supp. 337, was dissolved and Judge Hoffman proceeded to hear the merits of the controversy. The opinion of the single Judge is reported at 142 F. Supp. 341. The Federal Housing Administration appealed directly to the United States Supreme Court where probable jurisdiction was noted, the judgment was reversed, and the case was remanded for consideration by a three-judge district court. 352 U. S. 977.

In obedience to the mandate issued pursuant to the aforesaid action, the three-judge district court was convened. Counsel agreed, with the introduction of one additional exhibit and the supplementary testimony of one witness, to submit the matter on the basis of the record presented to District Judge Hoffman.

Upon consideration of the entire record, the briefs and argument of counsel, this court is in accord with the opinion of Judge Hoffman and herein incorporates the same by reference. With one minor correction and a brief comment as to our views, we are adopting the findings and conclusions of District Judge Hoffman.

It is stated in the opinion that the Act grants preferences to war workers and veterans. A review of the provisions leads us to the conclusion that the preference established by Congress was confined to veterans and their families. War workers are not mentioned therein. In this connection it will be noted that at no time since the completion of plaintiff's apartment project in July, 1951, has any person entitled to priority been rejected or required to wait any period of time to obtain occupancy of an apartment.

When Congress passed the Housing Act of 1954 declaring its intent "since the enactment of the National Housing Act" to the effect that housing built with the aid of mortgages insured under the former Act was

to be used "principally for residential use", it injected the last quoted words into the Act relating to "608 projects" for the first time. True, similar language had been used in related provisions of the National Housing Act, but the amplification of this "intent" to exclude the use of such housing for transient or hotel purposes while the insurance on the mortgage was outstanding makes its first appearance in the Act of 1954.

We cannot agree that an absolute prohibition, as here applied against rentals for less than thirty days, is within the reserved power of the Federal Housing Authority to regulate rentals and methods of operation as provided in the Act prior to the 1954 amendment.

There is little doubt but that this project was designed "principally for residential use" within the meaning of the National Housing Act of 1934, and that all but a small proportion of the rentable space is rented for periods exceeding 30 days. The evidence is uncontradicted that no qualified applicant has been delayed in obtaining, or denied, occupancy of apartments under leases of 30 days or more. The operators of the project do not undertake to provide many of the services expected by guests in hotels. All that is involved here is the right of the mortgagor to lease apartments, otherwise unrentable, for periods of less than 30 days.

To the extent that transient rentals may have interfered with the project's service of the stated purpose of the Act, there is room for argument that the Authority could, prior to the 1954 amendment, exercise its reserve power to regulate the methods of operation, and it may be contended that such power extends to the prohibition of transient rentals although we do not find it necessary to so declare. But when no such interference is shown, the only effect of the prohibition is to

impair the financial ability of the mortgagor to meet its obligations under the mortgage.

The reserved power to regulate methods of operation is referable to, and limited by, the stated and implied purposes of the Act. It cannot be construed to extend to a regulation which, as applied, serves no purpose of the Act, but contravenes the general purpose of the Act by increasing the likelihood of financial loss under the guaranty of the mortgage.

Since Judge Hoffman rendered his opinion in this case, the Federal Housing Administration has prepared and caused to be circulated a revised model form of certificate of incorporation which strictly limits the right to rent units for periods of less than 30 days. We find no fault with the right of Congress to provide such limitations as to projects not committed at the time of the passage of the Act of 1954, or the power of the Commissioner under Section 513(c) of the Act of 1954 to impose such restrictions as a condition of a grant of an extension of the term of the insurance. We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation.

Order accordingly.

APPENDIX B

(Prior Opinion of Single-Judge District Court)

In the United States District Court for the Eastern District of South Carolina, Charleston Division

Civil Action No. 4741

The Darlington, Inc., plaintiff

v.

Federal Housing Administration, defendant

OPINION

This is an action by way of declaratory judgment instituted by plaintiff (hereinafter called Darlington) against defendant (hereinafter referred to as F. H. A.) seeking a declaration of Darlington's rights to lease certain apartments in a multifamily apartment building owned by it for periods of less than thirty (30) days. The defendant, acting by and through Norman P. Mason, Commissioner of Federal Housing Aministration, requests dismissal of the action and affirmative relief by way of an injunction requiring Darlington to cease and desist in such practices. No issue is raised as to the failure to name the Commissioner as an original defendant; the Commissioner having waived this point in his pleadings. Defendant's motion to dismiss under Rule 12 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., was converted into a motion for summary judgment under Rule 56, thus enabling the Court to consider evidence presented by both parties and dispose of the entire controversy.

Darlington is a corporation organized and existing under the laws of South Carolina with its charter conforming in all respects to the requirements of

F. H. A., the insurer of the mortgage placed upon this modern, completely air conditioned, twelve-story multifamily apartment building erected by Darlington in the City of Charleston, South Carolina. Plaintiff urges that the practices engaged in by F. H. A. promoting the construction of these apartment buildings financed under Title VI § 608 of the National Housing Act,[1] as amended, should be considered by the Court in determining the equities involved, but there is no merit to this contention as the evidence discloses that the first application submitted was withdrawn due to the objection of certain F. H. A. officials as to the location of the project. Thereafter, a subsequent application was approved upon the insistence of Darlington's sponsors. That an error of judgment was made in the selection of a suitable location is rather obvious under the circumstances, but this affords no reason to penalize the defendant.

This is not a matter involving so-called windfall profits which became so prevalent under loose and questionable practices in the years following the termination of World War II. Plaintiff's sponsors caused land, valued at $125,000.00, to become a part of the project. It has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11. F. H. A. insured a mortgage to the extent of $1,357,700.00, thus leaving an investment of $318,220.11 on the part of the plaintiff. While it is impropable that this represents a total cash outlay by plaintiff, it is nevertheless conceded that the amount of the mortgage is approximately 90% of the total cost of the

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[1] National Housing Act, approved June 27, 1934, 48 Stat. 1246, as amended by addition of § 608, May 26, 1942; 56 Stat. 303, and as thereafter amended; 12 U. S. C. A. 1701, 1743.

building and well within the legitimate financing of "608 projects".

During the latter part of 1949 the "608" application was approved and, on December 7, 1949, a charter was granted to plaintiff by the Secretary of State of South Carolina. As heretofore noted, the charter was in accordance with a form prescribed by F. H. A. and contains, among other features, certain pertinent provisions as follows:

> * * * So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner *it shall engage in no business other than the construction and operation of a rental housing project or projects.*
>
> * * * * *
>
> (e) In the event of any default by the corporation, as hereinafter defined, and during the period of such default, the holders of the Preferred Stock (F. H. A.), voting as a class, shall be entitled to remove all existing directors of the corporations, and to elect new directors in their stead; provided, however, that one of said directors shall be the owner or holder of one or more shares of common stock. When such default or defaults shall have been cured, the right to elect directors shall again vest in the holders of the common stock.
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> * * * * *
>
> SEVENTH: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after commencement, any receivership, bankruptcy or other form of liquida-

tion instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by the terms of such instruments; (3) the failure of the corporation to establish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) *the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties,* or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated.

(b) In the event the mortgagor is in default under the terms of this certificate of incorporation or has failed to perform the covenants required by it to be performed under the terms of this certificate or by any mortgage insured by the Commissioner, the Commissioner may require the corporation to furnish at the expense of the corporation a complete audit of its books of account duly certified by a certified public accountant.

* * * * *

EIGHTH: *The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation,* the directors and the stockholders.

(a)(1) Dwelling accommodations of the corporation shall be rented at a maximum average

rental per room per month fixed by the Board of Directors of the corporation and approved by the holders of the Preferred Stock. A schedule of rentals for the reasonable rental value of each apartment based upon the average as so determined shall be filed with the holders of the Preferred Stock, prior to leasing or offering for lease of any of the dwelling accommodations of the project and when approved by them, shall thereafter be maintained except as provided in Article Sixth hereof. *Dwelling accommodations of the Corporation shall not be rented for a period in excess of three years* nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholder. Store accommodations shall be rented at a rental to be fixed by the directors with the prior written approval of the holders of the Preferred Stock. (2) The corporation shall have the right to charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between tenant and the corporation with the written approval of the holders of a majority of the shares of Preferred Stock, for any facilities and/or services which may be furnished by the corporation to such tenant upon his request, over and above the facilities and services to which such tenant may be entitled by virtue of his lease, including, among other things, telephone operator and switchboard services, electric current, gas, air cooling and conditioning and other additional or extraordinary facilities or services which may be furnished by the corporation in connection with the operation of such housing facilities.

(b) The corporation shall maintain its accommodations and the grounds and equipment appur-

tenant thereto in good and substantial repair and condition; provided, that in the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money deriving from any insurance on the property shall be applied in accordance with the terms of the insured mortgage on the premises.

(c) The corporation, its property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents and other papers relating thereto shall be subject to examination and inspection at any reasonable time by the Commissioner or his duly authorized agents; the corporation shall keep full and complete copies of all written contracts or other instruments which affect it or any of its property, all or any of which may be subject to inspection and examination by the Commissioner or his duly authorized agents.

(d) The books and accounts of the corporation shall be kept in accordance with the uniform system of accounting prescribed by the holders of the Preferred Stock.

(e) The corporation shall furnish the Commissioner within 60 days following the end of each fiscal year a complete annual financial report.

(f) At the request of the Commissioner, or of the holder of a majority of shares of the Preferred Stock, his or their agents, employees or attorneys the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested.

From a casual reading of the foregoing, it is apparent that the charter is not the constitution of an independent corporation and that the preferred stockholder (F. H. A.) is not just a shareholder. *Loftus* v. *Mason, Commissioner, etc.,* 139 F. Supp. 207, an opinion by District Judge Bryan, Eastern District of Virginia, rendered February 10, 1956. The pertinent question is the extent of the broad powers granted to F. H. A. under the charter, the by-laws, the mortgage, and any contract to which the Commissioner and the corporation are parties. In the main, the Court is of the opinion that the documents referred to are essentially to protect the financial obligation of F. H. A. as an insurer of the mortgage, but are not so far-reaching as to restrict the right to lease individual apartments for periods of less than thirty (30) days.

The financial structure of Darlington is, as one would already assume, grounded upon the issuance of 100 shares of preferred stock at a par value of $1.00 per share, all of which is owned and held by F. H. A. The 1,999 shares of common stock are held as follows: the Long Corporation—1,996 shares; L. D. Long—1 share; Leonard L. Long—1 share; T. E. Steadman—1 share. In turn, the Long Corporation is solely controlled by L. D. Long; certain others hold qualifying shares for voting purposes. From this it will be seen that L. D. Long controls the plaintiff corporation.

The mortgage, mortgage note, and building loan agreement were executed by plaintiff on December 7, 1949, and, after some slight delay, the transaction was consummated on December 30, 1949. On the reverse side of the mortgage note in the sum of $1,357,700.00 appears the following language:

> Insured under Section 608 of the National Housing Act and Regulations thereunder of the Federal

Housing Commissioner in effect on December 30, 1949.

To the extent of advances approved by the Commissioner.

FEDERAL HOUSING COMMISSIONER,
By H. E. BAILEY,
Authorized Agent.

Date, December 30, 1949.

It is conceded by F. H. A. that, as of December 30, 1949, no specific provision of the charter, by-laws, mortgage, mortgage note, or any rule or regulation of F. H. A., restricted the right of plaintiff to lease apartments in its project for periods of less than thirty (30) days. In fact, the only period of limitation appears in the charter where it is said:

> Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders.

It is significant that F. H. A. saw fit to impose a maximum rental period but overlooked what is now the partial subject of this controversy.

The project was completed in July, 1951; the first day of occupancy being July 27. By October 9, 1951, only 70 of the 156 apartments had been rented. As the project analysis contemplated a 7% vacancy, the plight of Darlington was inevitable. With no capital to purchase furniture for any of the apartments, the Long Corporation provided same and, from October 9, 1951, to February 21, 1952, furniture was provided in certain apartments rented for thirty (30) days or more. Beginning February 21, 1952, plaintiff rented fur-

nished apartments to tenants for periods of less than thirty (30) days, as well as in excess thereof. This practice has been increasingly remunerative to the point that, for the first six (6) months of 1955 (the last period under consideration by the Court), plaintiff showed an operating profit as contrasted with net operating losses for all prior periods.

Darlington secured approval of its maximum average rental per room per month on September 13, 1951. There is no contention that plaintiff has charged in excess of this schedule unless the charge for furniture is considered. Plaintiff has not requested an approval of rentals for furnished apartments as F. H. A. has taken the position that such approval will not be given unless Darlington executes a letter agreeing not to lease any portion of the premises to any person for less than thirty (30) days. F. H. A. first directed plaintiff's attention to the matter of furnished apartments and the agreement necessary to secure approval of a furnished apartment schedule by letter dated December 5, 1952. Apparently F. H. A. was not disposed to force the issue at that time but awaited the passage of the Housing Act of 1954, Public Law 560, 83rd Congress, Chapter 649, 2nd Session, J. R. 7839, 12 U. S. C. A. § 1731(b).[2] The subject was thereafter brought to

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[2] The pertinent portions of the Housing Act of 1954 are quoted at length as follows:

"SEC. 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that *this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.*

"(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multi-family housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner agreed in writing to the rental of all or a portion

life by a letter of F. H. A. to plaintiff dated January 4, 1955, which did not make reference to the Housing Act of 1954. In reply, Darlington made a fair disclosure of its operations as to furnished apartments and inquired as to what provisions of law or charter prohibited the renting of apartments for a period of less than thirty (30) days. Plaintiff's letter was referred to defendant's Deputy Assistant Commissioner who, in turn, then directed plaintiff's attention to the Housing Act of 1954. The present action followed this exchange of correspondence.

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of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

"(c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) *no mortgage with respect to multifamily housing shall be insured for an addtiional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes,* and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

"(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter in-

The rather unique method employed by plaintiff in handling the rental of furnished apartments is the proper subject of close scrutiny. A party seeking one-night occupancy at The Darlington is accepted, directed to his room, and, upon leaving, is given a receipt (by way of illustration) in the sum of $6.00 with only plaintiff's name printed thereon. In the lower left corner of this receipt appears appropriate spaces for the allocation of the $6.00 as to rent, telephone, and "furniture rent". Plaintiff thereupon takes the copies

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sured under this Act: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

"(e) As used in this section, (1) the term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term 'multifamily housing' shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corporation or trust of the character described in paragraph numbered (1) of subsection (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3) (B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (3) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

of the receipt and credits one-thirtieth of the maximum average rental per room per month to the item "rent", with the balance being allocated to "furniture rent". For example, the sum of $2.58 would be charged to "rent" and $3.41 to "furniture rent". At least monthly the "furniture rent" credits are paid to Long Corporation, the owner of the furniture. This rather ingenious scheme is a mere subterfuge and the Court has no patience with same. Furthermore, Long Corporation

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"(h) Whenever he finds a violation of any provision of this section has occurred or is about occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices, constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

pays no rent to plaintiff for the apartments in which its furniture remains, whether occupied or not. It may be argued that the availability of furnished apartments promotes the rentals, but F. H. A. admittedly controls the rental schedule on both furnished and unfurnished apartments. While the Court concludes that FHA cannot prohibit the leasing of apartments for periods of less than thirty (30) days, and cannot insist upon any agreement to desist from such practice, it is nevertheless true that F. H. A. controls the maximum rentals at all times and an injunction must issue against plaintiff prohibiting the leasing of furnished apartments for any period of time until and unless a schedule has been duly approved; the injunction to become operative after F. H. A. has approved a fair and reasonable rent schedule for furnished apartments which need not coincide with any monthly schedule heretofore approved. Whether Darlington is the owner of the furniture is immaterial as the rental of the apartment, furnished or unfurnished, is an integral part of the entire operation.

A study of the National Housing Act enacted June 27, 1934, 48 Stat. 1246 (1934), together with numerous amendments and additions thereto, with particular reference to Title VI, § 608, leads to the inevitable conclusion that it was the intent of Congress to provide housing accommodations on the mortgaged property *designed principally for residential use*. It is so stated in the Administrative Rules and Regulations of F. H. A. in existence as of the date of the insuring of the mortgage herein. F. H. A. insists that the word "principally" was intended to permit insurance of apartments on which commercial facilities were planned, such as drug counters, snack bars, etc. Plaintiff advances the theory that the word "principally" necessarily implies a right to rent to so-called

transients, and argues that the doctrine of *expressio unius est exclusio alterius* is applicable. In any event the word "principally" cannot be construed to mean "exclusively". It is not for this Court to delete or distort the words of Congress or the Commissioner. *62 Cases, etc.* v. *United States,* 340 U. S. 593, 71 S. Ct. 515, 95 L. Ed. 566; 82 C. J. S., "Statutes", p. 530, § 312. Does the leasing of certain apartments for periods of less than thirty (30) days alter the words "principally for residential use"? The Court does not believe that such an arrangement violates the intent of Congress when all factors mentioned herein are taken into consideration.

There has been no contention that plaintiff has failed to give preference to war workers and veterans, or has discriminated against familes with children. These are requirements of the Act, but are not in issue. It is conceded that no person entitled to priority has ever been rejected, and no one desiring so-called "permanent" occupancy of an apartment has been required to wait any time to obtain same. While these provisions tend to support the view that this multifamily apartment was designed "principally for residential use", it may also be argued that the interpretation now requested by F. H. A. could have the effect of depriving a veteran of the preference granted to him by Congress in the event he wished to occupy an apartment for a period of less than thirty (30) days.

As the emergency created by returning veterans of World War II came to an end, the demand for multifamily apartments in certain areas was materially reduced. Faced with the necessity of maintaining mortgage payments, reserves for depreciation, operating expenses, etc., mortgagors sought other means of income in order to protect their investments.

Furnished apartments proved to be an incentive for rentals and apparently F. H. A. has approved of such methods, thereby permitting a reasonable number of apartments to be rented on schedules duly submitted and approved. It is admitted that, prior to the passage of the Housing Act of 1954, F. H. A. granted permission in from 12 to 15 projects to rent for periods of less than 30 days, the right of which is contended to be under F. H. A.'s broad power of control of "methods of operation". When the attention of the American Hotel Association was directed to instances of so-called transient rentals, a stern protest was registered which ultimately brought about the enactment of the Housing Act of 1954. The plaintiff herein does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients. Contrary to the contention of plaintiff, any such action would, in the opinion of the Court, violate that provision of the charter which prohibits engaging in any business other than the operation of a rental housing project. But the mere acceptance of transients as tenants does not, in and of itself, convert a rental housing project into a hotel. During March, 1955, there were 121 individual instances of rentals for less than thirty (30) days, of which 48 remained one day, 22 for two days, 12 for three days, 20 for seven days, etc. As March may be considered generally as the season of greatest demand for transients in Charleston, it is not unlikely that the figures quoted above give the largest illustration of so-called transient rentals. For that month there appeared to be an average of 15 furnished apartments rented, or available for rent, for periods of less than thirty (30) days. This is tantamount to approximately ten per centum of the entire available occupancy. This Court is not of the opinion that a ten

per cent rental allocation for persons desiring space for periods of less than thirty (30) days is the equivalent of converting the project into a hotel when unaccompanied by any act of advertising for transients as a hotel. While the factual situation is somewhat different, this Court leans to that part of the opinion in *People* v. *Goldfogle,* 121 Misc. Rep. 341, 201 N. Y. Supp. 262, 264, where it is said:

> The mere fact that a building constructed and operated as a hotel in the common acceptance of that term may be occupied by a few tenants on long leases would certainly not change the character of the building as a whole. The converse is true here. The rooms occupied by transients, forming but 20 per cent. of the total numbers of rooms, are being so used only temporarily in order to derive an income therefrom pending attempts to lease them for long terms, like the rest of the rooms. Even the "transient" rooms are charged for by the room, and not by the number of persons who may occupy them. The building is without any of the public rooms or public accommodations usually associated with the idea of a hotel. Under these circumstances, I think that the building is to be regarded as having maintained its original character of an apartment house, unaffected by the casual fact that some of the rooms are temporarily devoted to purposes which have some of the elements of hotel accommodation.

The unusual situation created by reason of F. H. A.'s insistence to cease the practice of renting apartments for periods of less than thirty (30) days will admittedly necessitate the financial downfall of Darlington, with the resultant loss of an initial invest-

ment, together with the monthly payments of $6222.79 each, beginning June 1, 1951, as well as a reserve account, etc. It certainly would not justify the continued existence of Darlington and bankruptcy would be the ultimate answer. A foreclosure of the mortgage would follow with the Commissioner of F. H. A. acquiring title as it is a fair assumption that no purchaser at said sale would bid an amount equal to, or in excess of, the unpaid balance due on said mortgage. The mortgagee is obligated to acquire title under such circumstances and assign that title to the Commissioner who, in turn, sells the property without regard to any limitation as to use, etc., unless, of course, F. H. A. insures a new mortgage on the project. The result is that a foreclosure is likely to bring about a hotel with its right to advertise and operate as such—the mortgagor would lose its investment—F. H. A. would undoubtedly be called upon to pay a substantial sum by reason of its insurance obligation to the mortgagee—and no one would profit.

The position of the American Hotel Association is not without merit. Investments in hotels are substantial and such enterprises have been without the aid of 90% to 100% financing guaranteed by an agency of the United States. The promotion of motels has made serious inroads on operation of hotels. It may be readily understood why the Hotel Association exerted its efforts to persuade Congress to pass the Housing Act of 1954, thus defining transient rentals and prohibiting leases in F. H. A. insured projects for periods of less than thirty (30) days. As to projects committed subsequent to the passage of the 1954 Act, there can be no question as to its constitutionality or applicability. But with respect to projects already in operation, this Court has concluded that the Housing Act of 1954 is ineffective as, under the circumstances, it

cannot be made retroactive. A careful study of the 1954 Act will illustrate that plaintiff's right to lease for periods of less than thirty (30) days undoubtedly existed prior to that date despite the primary intent of Congress. Under what theory, then, may Congress take away that right which is not, in itself, contrary to any law, rule, or regulation? This case does not involve the exercise of police power, war powers, zoning laws, tariff laws, export and import licensing, emergent or tax legislation—all of which have, in one form or another, upheld the validity of retroactive legislation. When the United States enters into contractual relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. *Lynch* v. *United States,* 292, U. S. 571, 54 S. Ct. 840, 78 L. Ed. 1434. As was said in *Union Pacific Railway Co.* v. *United States,* 99 U. S. 700, 25 L. Ed. 496, 504:

> The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If

> they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

To the same effect, see: *The Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. (17 U.S.) 518, 4 L. Ed. 629. Even if it could be successfully argued that plaintiff had no vested right to lease an apartment for a period of less than thirty (30) days, the effect of the Housing Act of 1954 undoubtedly attempts to create a new obligation with respect to a past transaction and hence must fail. 16 C. J. S., "Constitutional Law", § 417, p. 861. To open an avenue for retroactive or retrospective laws in the field of contracts not dealing with police, war, or emergent powers, would have a very serious effect in the commercial world which has become so involved with government financing and other related subjects. In substance, there must be a stopping point somewhere, and this appears to illustrate the dangers involved where Congress has yielded to the requests of a third party with knowledge that there will be a financial loss to the mortgagor and, to a limited extent, the taxpayers.

It is the duty of the Court to determine the intent of Congress as to the meaning of any law passed. *Stockdale* v. *The Insurance Companies,* 20 Wall. (87 U. S.) 323, 22 L. Ed. 348; *Town of Koshkonong* v. *Burton,* 104 U. S. 668, 26 L. Ed. 886. The expressions of the members of the legislative body are entitled to respect and consideration in determining what the rule or law was at the time of passage, but if the Court is

reasonably satisfied that the later expression or construction is erroneous, the same should be disregarded. It is interesting to note that, at the time of the hearings on the Housing Act of 1954 before the Senate Committee on Banking and Currency, Senator Capehart, who presided over the meeting, said:

> I didn't write the law, it was written back in 1940. I wasn't here, so I can't tell what the intention was.

While it may be assumed that some members of Congress in 1954 were also members in 1940, and even in 1934 when the original National Housing Act was passed, there is no affirmative intimation of Congressional intent other than from the wording of the 1954 Act and the Committee reports. In truth and in fact, the question now under consideration was never given a thought. In the desire of Congress to fulfill the need for housing, only such matters as the needs of war workers, veterans, families of veterans, and the customary soundness of the transaction from a financial standpoint with its attendant restrictions were the subject of legislation and intention.

If the Administrative Rules and Regulations for Rental Housing Insurance under Section 608 of the National Housing Act, as amended May 22, 1946 (which Rules and Regulations were in existence at the time of the commitment, insurance and construction of the Darlington project), are to be given any effect as to the intent of Congress prior to 1954 or as to the final determination of this case, it is abundantly clear that there was no intention to thereafter create a new obligation with respect to a past transaction assuming, of course, that the operation by the mortgagor was not per se unlawful. Article VIII of said Rules and Regulations covering the matter of "Amendments" states:

These Regulations may be amended by the Commissioner at any time and from time to time, in whole or in part, *but such amendments shall not affect the contract of insurance on any mortgage already insured* or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure.

At the time hearings were conducted before the Senate Committee on Banking and Currency in March, 1954, Mr. Arthur J. Packard, Chairman of the Board of the American Hotel Association, made this pertinent statement:

> As I mentioned before, we have tried for four or five years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743 (b) (i), in connection with section 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved. At the outset, the agency always required approval of all rent schedules. And these were normally expressed in monthly rentals. But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice. (Page 656, 657. Hearings before Senate Banking and Currency Committee on Housing Act of 1954.)

The statement of Mr. Packard is questioned by the testimony of the Director of the Legal Division of F. H. A. as being somewhat erroneous, but the fact that F. H. A. apparently did not resort to any legal process in an effort to bring about a cessation of such practices affords a fair assumption that the interpretation placed thereon by the Administrative Agency was at least doubtful.

It is true that the Commissioner has always retained the authority to regulate rents, charges, and "methods of operation". This is so specified in the Act. 12 U. S. C. A. 1743 (b) (1). What, then, is the meaning of the words "methods of operation"? Should it be given a broad interpretation which would, in effect, grant to F. H. A. the rights ordinarily reserved to an owner of real estate? The answer to these inquiries may be found in the interpretation placed thereon by F. H. A. In a bulletin entitled "Multifamily Rental Housing Insurance" providing for the Administrative Rules and Regulations under Section 207 of Title II of the National Housing Act, revised August 13, 1954 (the forerunner and successor of Section 608), the Commissioner significantly points out what is meant by the term "Methods of operation". Reg. § 232.19 (f). Without quoting verbatim what is contained therein under "methods of operation", it is sufficient to state that, for the proper consideration of this case, the items mentioned are substantially the same as the items referred to in Darlington's charter subsequent to the words, "The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation, the directors and the stockholders". True, in the 1954 revision, a special clause was inserted in Reg. § 232.20 (b) under the heading "Special certificates and contract to be executed by mortgagor", prohibiting the rental of any

part of the property "for transient or hotel purposes", and further providing that the mortgagor's charter shall contain like provisions. This is potent evidence of the fact that, prior to 1954, it had never been the intention of F. H. A. or Congress to prohibit any practice of leasing for periods of less than 30 days, and, further, that the term "methods of operation" was not intended to include a like prohibition. If such is not the case, what would be the purpose of F. H. A. in requiring these specific provisions in corporate charters?

Assuming arguendo that plaintiff's stockholders had sold their stock in Darlington shortly after the completion of the project, how would any new owner of the capital stock ascertain that such an intent or regulation existed as now suggested by F. H. A.?

It must be recalled that F. H. A. is in the insurance business and that Congress, in launching a governmental agency into the commercial world, endowed it with the authority to sue and be sued and contemplated that it would be treated as any private enterprise. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 60 S. Ct. 488, 84 L. Ed. 724. Similarly, it has been held that regulations promulgated by F. H. A. are to be construed against F. H. A. *Ferguson* v. *Union National Bank*, 4 Cir., 126 F. (2d) 753, an opinion by Chief Judge Parker; *Garrison* v. *United States*, 7 Wall. 688, 690, 19 L. Ed. 277. Adopting this rule of construction, there is no sound reason for arguing that plaintiff did not have a right given to it in the legitimate use and enjoyment of its property to rent a reasonable number of apartments for periods of less than thirty (30) days. Furthermore, there is no magic in the selection of thirty (30) days.

The Housing Act of 1954 discriminates against plaintiff in that it empowers the Commissioner to exclude the operation of the "transient rental" clause

located in a resort area from the provisions of the Act if a portion of the accommodations in the project had been made available for rent for "transient or hotel" purposes prior to May 28, 1954. Through the efforts of Senator Smathers (Florida), this provision was inserted and, in effect, the entire State of Florida was designated as such. The "608 projects" in Florida and other resort areas were constructed under the same charter, mortgage, rules and regulations as was Darlington. Moreover, it will be noted that the sales promotion advanced by F. H. A. during the years following World War II and prior to the Korean War suggested to sponsors that mortgages could be refinanced or insured for additional terms if the same became necessary. While there is no legal obligation upon F. H. A. to insure for an additional term, the Housing Act of 1954 effectively forecloses this possibility as to all multifamily housing projects except those which are excluded by reason of being situated in resort areas.

Additionally, Congress apparently was uncertain as to its right to legislate retroactively when it inserted in the 1954 Act the words:

> *Provided,* That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

That the 1954 Act is designed to afford relief for private interests, as distinguished from public purposes, is further evidenced by the clause which grants a right to any person owning or operating a hotel within a radius of fifty miles from the "project" to institute an action in the appropriate District Court enjoining the alleged violation.

Even assuming the right of Congress to delegate the power to "regulate" to an administrative agency, the agency exercising such authority pursuant to contract will not be permitted to negate the plain words of the contract by adding regulations subsequent to the date the agency committed itself. Such authority would completely destroy the contract.

A decree will be prepared by counsel for plaintiff adjudicating its rights under the declaratory judgment action, stating in substance:

1. The defendant and its Commissioner have no right to prohibit the rental of a reasonable number of apartments in The Darlington for periods of less than thirty (30) days, as long as priorities are maintained for the persons entitled thereto and no proper person desiring occupancy for a period of thirty (30) days or more is thereby precluded from obtaining accommodations.

2. If any of said accommodations are furnished by plaintiff, or permitted to be furnished by plaintiff, said plaintiff shall promptly submit to defendant a proposed schedule of maximum average rentals (including furniture and other incidentals) and, if fair and reasonable under all the circumstances, defendant shall approve said schedule and plaintiff will thereupon be enjoined from making any rental charges, directly or indirectly, in excess of the approved schedule.

3. The defendant may not insist upon plaintiff's execution of any agreement to desist from renting for periods of less than thirty (30) days as a condition precedent to the approval of a rental schedule for furnished apartments to be leased for periods of less than three (3) years, irrespective of the minimum time of leasing.

4. The plaintiff has no right to advertise as a hotel or to advise the general public through any medium

of advertising or letters of its willingness to accept so-called transients; nor may plaintiff obtain any license to operate as a hotel or post any signs indicating its ability to accept any tenant for periods of any particular duration. No injunction need issue as to such matters as there is no contention that plaintiff is operating as such.

5. Both parties having prevailed herein to a limited extent, the taxable costs, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, shall be equally divided.

6. Should either party file a notice of appeal within the time permitted from the date of the entry of the decree to be submitted, the effectiveness of said decree will be stayed for a period of forty (40) days to permit the appealing party or parties to obtain an appeal to said decree in the Court of Appeals for the Fourth Circuit, if they be so advised.

(Sgd) WALTER E. HOFFMAN,
United States District Judge
(*Under Designation*).

Norfolk, Virginia,
June 20, 1956.

APPENDIX C

(DECREE)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 4741

THE DARLINGTON, INC., PLAINTIFF

v.

FEDERAL HOUSING ADMINISTRATION, DEFENDANT

This cause came on to be heard upon plaintiff's complaint seeking a declaratory judgment and defendant's motion to dismiss under Rule 12(c) of the Federal Rules of Civil Procedure, which was converted into a motion for summary judgment under Rule 56, and evidence having been offered, briefs filed and argument presented to this Court by both parties, and upon consideration thereof, the Court having filed its opinion on July 13, 1957, disposing of all issues involved, now pursuant to said opinion, it is hereby

ORDERED, ADJUDGED AND DECREED as follows, viz.:

(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as the Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided that any veteran of World War II, his immediate family, or any other proper person desiring occupancy for a period of thirty days or more is not

thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered.

(2) Except to the extent that the following conditions shall be lawfully varied, changed, suspended or removed (i) pursuant to any applicable provision of the National Housing Act as the same may be amended, or any lawful regulation or administrative order issued thereunder, (ii) in accordance with an agreement between the parties in this action, or (iii) in accordance with any further order of this Court, the plaintiff herein shall observe and comply with the following conditions:

(a) The plaintiff shall not lease, or make available for leasing, for terms of less than thirty days more than 15% of the total number of apartments in the project.

(b) The plaintiff shall not increase its schedule of rents and charges now in effect for rentals of apartments for less than thirty days and for furnishings and other incidentals offered or supplied in connection therewith.

(c) The plaintiff shall not advertise itself as a "hotel", nor shall it through the use of any advertising medium, the circulation of letters, the maintenance of signs, or otherwise solicit the business of transients for less than thirty days occupancy, or advise the general public of its willingness to provide accommodations for transients for periods of less than thirty days occupancy.

(d) The plaintiff shall not provide occupants of its project with food or beverage room service, or maintain regular bell boy service.

3. Except as otherwise provided herein, the defendant may not compel the plaintiff to desist from the

rental of apartments for less than thirty days nor may it condition its approval of any application which the plaintiff may file for approval of changes in its schedule of rentals, or charges for other services, upon an agreement by the plaintiff to desist from such rentals.

4. The taxable costs of this action, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, are to be borne equally by plaintiff and defendant, one-half of such costs to be taxed against each party.

5. Jurisdiction of the cause and the parties to this action shall be retained for the purpose of entering such further orders and decrees as may appear to the Court, or any Judge thereof, to be appropriate and not inconsistent with the opinion heretofore filed.

CLEMENT E. HAYNSWORTH, JR.,
United States Circuit Judge.
GEORGE BELL TIMMERMAN,
United States District Judge.
WALTER E. HOFFMAN,
United States District Judge.

SEPT. 4th, 1957.

APPENDIX D

STATUTES INVOLVED

1. Section 608 of the National Housing Act, 56 Stat. 303, as amended, 12 U. S. C. 1743, provides in pertinent part:

> SEC. 608. (a) In addition to mortgages insured under section 603 of this title, the Commissioner is authorized to insure mortgages as defined in section 601 of this title (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided.
>
> (b) To be eligible for insurance under this section a mortgage shall meet the following conditions:
>
> (1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the War Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.
>
> (2) Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families, and for hardship cases as defined by the Commissioner, shall be provided under such regulations and procedures as may be prescribed by the Commissioner.
>
> * * * * *

2. Section 513 of the National Housing Act, added by Section 132 of the Housing Act of 1954, 68 Stat. 610, 12 U. S. C. (Supp. IV) 1731b, provides:

SEC. 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

(c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954),

and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) no mortgage with respect to multifamily housing shall be insured for an additional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes, and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided,* That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

(e) As used in this section, (1) the term "rental for transient or hotel purposes" shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes,

and (2) the term "multifamily housing" shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corporation or trust of the character described in paragraph numbered (1) of subsection (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3) (B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (d) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United

States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices, constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing

the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section.

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No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL HOUSING ADMINISTRATION, APPELLANT

v.

THE DARLINGTON, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 628

FEDERAL HOUSING ADMINISTRATION, APPELLANT

v.

THE DARLINGTON, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellee has moved to dismiss the appeal on the ground that the judgment below was not rendered in an action required to be heard and determined by a district court of three judges, and that this Court accordingly does not have jurisdiction under 28 U. S. C. 1253. Specifically, appellee takes the position that this action does not involve the constitutionality of Section 513 of the National Housing Act because that provision was not designed to have retrospective effect. We submit that there is no merit whatever to this contention.

1. This is not the first time that this litigation has reached this Court. The Federal Housing Administration now appeals from a decree of a district court

of three judges. During the past term, appellant appealed from a substantially identical decree granted by a single district judge.[1] Appellant's jurisdictional statement in the prior case challenged the power of the single district judge to grant a decree invalidating an act of Congress.[2] Appellee did not file any motion or other paper supporting the jurisdiction of the single district judge. This Court noted probable jurisdiction, summarily reversed the judgment, and remanded the case for consideration by a three-judge district court because the action was required to be heard and determined by a three-judge district court. *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977.

Nonetheless, the same appellee now asks this Court to disavow its earlier decision and to dismiss this appeal on the ground (contrary to its own earlier ruling) that the case did not have to be heard and determined by a district court of three judges. We submit that the circumstances call for strict adherence to the fundamental consideration that orderly judicial procedure does not permit a relitigation of previously determined issues. Cf. *Insurance Group* v. *Denver & Rio Grande Western R. Co.*, 329 U. S. 607, 612.

2. In any event, the previous holding of this Court—that the ruling of the single district judge (now adopted by the three-judge court) constituted a re-

[1] See Appendix, *infra*, pp. 5–7. The opinion of the district court of three judges adopted the findings and conclusions of the single district judge "[w]ith one minor correction and a brief comment" (cf. Jurisdictional Statement, p. 22).

[2] See Jurisdictional Statement, pp. 3, 19–21, in No. 593, O. T. 1956.

straint upon the enforcement of an Act of Congress for alleged repugnance to the Constitution—was clearly correct. The district court's decision was not, and could not have been, based on the theory that the civil sanctions of Section 513 of the National Housing Act were not designed to apply to buildings constructed prior to the passage of the Housing Act of 1954. For Section 513 (d) shows explicitly that Congress proposed to cover housing insured "prior to the effective date" of the 1954 Act. That section reads:

> The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under the Act * * *[3]

Appellee, itself, plainly recognized the retrospective aspect of the statute and challenged its constitutionality on that basis. (R. 15; see also R. 16.) And the opinions of the three-judge court and of the single-judge court make it clear that the district court was passing on the congressional power to impose upon appellee what was considered to constitute a new obligation.[4]

In sum, there can be no doubt that appellee sought an injunction on the ground that the retrospective

[3] A proviso of Section 513 (d) (Jurisdictional Statement, p. 56) contains a significant exception required by the constitutional prohibition against criminal *ex post facto* laws.

[4] See, *e. g.*, Jurisdictional Statement, pp. 24, 41–42, 43, 49.

features of Section 513 were repugnant to the Constitution, and that the court below rested on that ground. The action thus was required to be heard and determined by a court of three judges (28 U. S. C. 2282) and this Court alone has jurisdiction to review the decision below (28 U. S. C. 1253, 1291).

CONCLUSION

The motion to dismiss should be denied and this Court should note probable jurisdiction.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

JANUARY 1958.

APPENDIX A

(Prior Judgment of Single-Judge District Court)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 4741

THE DARLINGTON, INC., PLAINTIFF

v.

FEDERAL HOUSING ADMINISTRATION, DEFENDANT

DECREE

This cause came on to be heard upon plaintiff's complaint by way of declaratory judgment and defendant's motion to dismiss the complaint under Rule 12 (c) of the Federal Rules of Civil Procedure, which was converted into a motion for summary judgment under Rule 56, and evidence having been offered, briefs filed and argument presented by both parties, and upon consideration thereof, the Court having filed its opinion on June 21, 1956, disposing of all issues involved, now pursuant to said opinion, it is hereby

ORDERED, ADJUDGED AND DECREED as follows, viz.:

(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of

less than thirty days, provided the required priorities are maintained for the persons entitled thereto, namely, veterans of World War II, and their immediate families, and provided that no proper person desiring occupancy for a period of thirty days or more is thereby precluded from obtaining unfurnished accommodations, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered. The parties have stipulated that, for the purpose of the Court's opinion filed herein, the maximum number of apartments available for lease for terms of less than thirty days shall not exceed fifteen percent of the total number of apartments in the project until the further order of Court or subsequent agreement between the parties.

(2) The plaintiff shall promptly submit to the defendant a proposed schedule of the maximum average rentals (including furniture and other incidentals and services) for any furnished accommodations in said building, and if fair and reasonable, under all the circumstances, the defendant shall promptly approve said schedule without regard to any monthly rental schedule heretofore approved, and in approving said schedule, the defendant shall take into consideration extra services and incidentals necessarily furnished with such apartments which may be rented for less than thirty days, and the plaintiff shall thereupon be enjoined from making any rental charges directly or indirectly in excess of the approved schedule.

(3) The defendant may not insist upon the execution by the plaintiff of any agreement to desist from

renting for periods of less than thirty days as a condition precedent to the approval of a rental schedule for furnished apartments to be leased for periods of less than three years, irrespective of the minimum time of leasing.

(4) The plaintiff has no right to advertise as a hotel or to advise the general public through any medium of advertising or letters, of its willingness to accept so-called transients; nor may plaintiff obtain any license to operate as a hotel, or post any signs indicating its ability to accept any tenant for periods of any particular duration; nor shall it provide bell boy or food and beverage room service.

(5) The taxable costs of this action, including the expense of the original transcript of testimony taken at Charleston, South Carolina, and Norfolk, Virginia, are to be borne equally by plaintiff and defendant, one-half of such costs to be taxed against each party.

(6) Should either party file a notice of appeal within the time permitted from the date of entry of this Decree, the effectiveness of said Decree will be stayed for a period of forty (40) days to permit the appealing party or parties to obtain an appeal to said Decree in the Court of Appeals for the Fourth Circuit, if they be so advised.

(Sgd.) WALTER E. HOFFMAN,
United States District Judge.

NORFOLK, VIRGINIA,
July 18, 1956.

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OCTOBER TERM, 1958

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v.

THE DARLINGTON, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION, APPELLANT

v.

THE DARLINGTON, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the three-judge district court, entered July 13, 1957 (R. 127–130), is reported at 154 F. Supp. 411. The prior opinion of District Judge Hoffman, dated June 20, 1956, incorporated by reference in the opinion of the three-judge court (R. 101–121), is reported at 142 F. Supp. 341. Other earlier opinions in this litigation are reported at 352 U. S. 977 and 134 F. Supp. 337.

JURISDICTION

This suit, brought by appellee under the National Housing Act, as amended, and under 28 U. S. C. 2201–2202, asks for declaratory and injunctive relief

determining that, notwithstanding Section 513 of the Act, added in 1954, 68 Stat. 610, 12 U. S. C. (Supp. V) 1731b, appellee has the right to rent apartments in its building for terms of less than thirty days. The complaint alleged that application of the 1954 Act to appellee would be unconstitutional, and the three-judge court so held (R. 127–130). The judgment (R. 130–132) was entered on September 4, 1957, and the Federal Housing Administration filed its notice of appeal on October 2, 1957 (R. 132–133). This Court noted probable jurisdiction on January 27, 1958. 355 U. S. 929; R. 133.

The jurisdiction of this Court to review the judgment of the three-judge district court on direct appeal is conferred by 28 U. S. C. 1253 and is sustained by the following cases: *Swift & Co.* v. *United States*, 343 U. S. 373, 376, and *United States* v. *Great Northern R. Co.*, 343 U. S. 562, 567–568.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes, *viz*, Sections 608 and 513 of the National Housing Act, as amended (56 Stat. 303, 12 U. S. C. 1743, and 68 Stat. 610, 12 U. S. C. (Supp. V) 1731b), and regulations, *viz*, portions of 24 C. F. R. 280, are set forth in Appendix A, *infra*, pp. 47–51, and Appendix B, *infra*, pp. 52–57.

QUESTIONS PRESENTED

By insuring a mortgage, appellant Federal Housing Administration enabled appellee to finance and construct a building in 1949. This insurance took place pursuant to legislation which aimed to promote the construction of residential rental housing, first

for war workers, later for returning veterans. The regulations issued under the statute required that the insured project be designed principally for residential use. In its charter, appellee undertook to restrict itself to the business of operating a rental housing project. After the completion of the project, appellee rented some of its apartments as furnished overnight accommodations for transients. The Housing Act of 1954 explicitly prohibited such rentals, regardless of whether the Administration committed itself to insure the mortgage before or after the passage of that Act.

A district court of three judges held that the Housing Act of 1954 was unconstitutional to the extent that it prohibited rental to transients in projects theretofore approved by appellant, and ruled that appellant had no right to prohibit such rental.

The questions presented are:

1. Whether appellee's rental of apartments to transients was prohibited prior to the Housing Act of 1954, in view of the purpose of the earlier legislation and the nature of appellee's undertaking to limit its business to a rental housing project consisting of dwelling units.

2. Whether the explicit prohibition of the 1954 Act was beyond the power of Congress, as applied to a project theretofore approved.

STATEMENT

Appellee is the owner of an apartment house located in the City of Charleston, South Carolina. In order to finance construction of this building, it applied for

and obtained Federal Housing Administration mortgage insurance under Section 608 of the National Housing Act. This litigation involves appellee's right to rent[1] apartment to transients, *i. e.*, to rent for periods of less than thirty days.

1. The statutory and regulatory background

(a) Section 608 (b) (2) of the National Housing Act, 56 Stat. 303, 12 U. S. C. 1743, as amended by Section 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214, authorized[2] the Commissioner of the Federal Housing Administration to insure mortgages covering housing projects in which preference for occupancy was afforded World War II veterans and their immediate families.[3] The principal obligation of the mortgage could not exceed ninety per cent of the replacement cost of the mortgaged property (Sec. 608 (b) (3) (B)), nor exceed $5,000,000 (Sec. 608 (b) (3) (A)). The Commissioner was empowered to regulate the mortgagor's rents, charges, capital structure, rate of return or methods of operation either by contract or by acquiring a stock interest in the mortgagor (Sec. 608 (b) (1)).

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[1] The words "rent" and "rental" will be used in this brief to apply to the relationship between appellee and occupants of appellee's apartments, whether those occupants are long-term tenants or simply transients.

[2] The authority to insure mortgages under Section 608 has been withdrawn as to all applications received after March 1, 1950, 63 Stat. 905, 64 Stat. 57.

[3] Preference was also given to "hardship cases as defined by the Commissioner" (Sec. 608 (b) (2)).

The Commissioner was also directed to promulgate regulations necessary for carrying out Section 608 (Sec. 607). Under this authority, he issued regulations (24 C. F. R. 280[4]) which, at the time that appellee's mortgage was insured, provided the following: The mortgagor had to be a corporation or trust formed, with the Commissioner's approval, for the purpose of providing housing for rent or sale, and, until the mortgage insurance terminated, subject to the Commissioner's regulation of rents, charges, capital structure or methods of operation (24 C. F. R. 280.26 (a)). So long as the mortgage insurance remained in effect, the mortgagor was permitted to "engage in no business other than the construction and operation of a rental housing project or projects" (24 C. F. R. 280.26 (a)). In order to regulate the mortgagor, the Commissioner was to receive "certain shares of [the mortgagor's] special stock" which would confer majority voting rights in the event of default under the mortgage, charter or any other agreement between the mortgagor and the Commissioner (24 C. F. R. 280.29). When the Commissioner's obligation under the contract of mortgage insurance terminated, his right to regulate the mortgagor also was to terminate (24 C. F. R. 280.29).

At the time the Commissioner insured the mortgage, the mortgagor had to have completed, or to have become obligated to construct and complete, new housing accommodations designed principally for

[4] This was originally designated 24 C. F. R. 580. It was renumbered 24 C. F. R. 280 on December 23, 1948, 13 F. R. 8260.

residential use, and consisting of not less than eight rentable dwelling units (24 C. F. R. 280.34). Veterans and their immediate families had to be given preference in the renting of the apartments, and the mortgagor could not discriminate against families with children (24 C. F. R. 280.24). The rentals could not exceed those reflected in a rental schedule filed with the Commissioner and approved by him prior to the opening of the project, and could not be changed without the Commissioner's approval (24 C. F. R. 280.30 (a)). The established maximum rental was to be the "maximum authorized charge against any tenant for the accommodations offered" and any additional charge was subject to the Commissioner's approval (24 C. F. R. 280.30 (b)).

(b) During hearings before the Banking and Currency Committees of the House of Representatives and the Senate preceding the passage of the Housing Act of 1954 (68 Stat. 590), representatives of the hotel industry complained that many Section 608 rental housing projects were taking in transients in competition with hotels.[8] Both committees agreed that this complaint was justified. Since the FHA rental housing insurance program was "designed to provide rental accommodations for family use", not hotel accommodations, the House Committee concluded that "[t]he fact that a project has been insured should * * * be a prohibition to rental on a tran-

[8] Hearings before the Committee on Banking and Currency, House of Representatives, 83rd Cong., 2d Sess., on H. R. 7839, pp. 507–515; Hearings before the Committee on Banking and Currency, Senate, 83rd Cong., 2d Sess., on S. 2889, 2938, 2949, pp. 654–661.

sient basis." H. Rept. No. 1429, 83rd Cong., 2d Sess., p. 17. Believing that remedial legislation was unnecessary, the House Committee called upon the FHA to "take firm action to obtain full compliance with such contracts [*sic*] as have been imposed for this purpose in those contracts, making such investigation and taking such other enforcement action as may be required". *Id.* at p. 18.

Although the Senate Committee likewise concluded that the purpose of federal housing insurance was "to increase the supply of permanent residential housing, not to increase the supply of hotels or motels or similar establishments catering to nonpermanent residents", it felt it was desirable "to clarify the intent of the Congress" by expressly prohibiting transient occupancy. S. Rept. No. 1472, 83rd Cong., 2d Sess., p. 31. In conference, the House managers agreed to express the legislative intent in specific legislation (H. Rept. No. 2271, 83rd Cong., 2d Sess., pp. 77–78).

As finally enacted, Section 132 of the Housing Act of 1954 (68 Stat. 610) added a new Section 513 (12 U. S. C. 1731b) to the National Housing Act. Subsection (a) contains the Congressional declaration that, since the enactment of the National Housing Act, it has been the legislative purpose "that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding". Subsection (b) provides that "no new, existing, or rehabilitated multifamily housing" subject to an FHA insured mortgage may be

operated for transient or hotel purposes unless such use was expressly authorized by the Federal Housing Commissioner prior to May 29, 1954, or the building is in an area designated by the Commissioner as a resort area and, prior to May 28, 1954, was used for transient purposes. In either case, however, the number of transient accommodations which may be made available cannot exceed the number that was available on May 28, 1954. Subsections (d), (f) and (g) direct the Commissioner to "enforce the provisions of this section [Section 513] by all appropriate means at his disposal" including, after proper investigation, an order that violations cease immediately and, if that order is not obeyed, a reference of the matter to the Attorney General for appropriate civil or criminal proceedings.* Under subsection (h), the Attorney General may obtain injunctive relief against existing or imminent violations of the Act. Subsection (i) grants the same remedy to any person owning or operating a hotel within fifty miles of the place where the violation occurs or is about to occur.

2. The facts underlying this litigation

Appellee Darlington is a corporation chartered under the laws of South Carolina (R. 102). It was formed on December 7, 1949 (Pl. Ex. 19, R. 43, 184) for the purpose, *inter alia*, of obtaining Federal Housing Administration insurance of a mortgage (Pl. Ex. 19, R. 43, 185) covering a twelve-story apartment house which was to be constructed in Charleston,

*Subsection (d) expressly excepts from criminal penalty any violation occurring prior to September 3, 1954.

South Carolina (R. 102). It was capitalized with 1,999 shares of $100.00 par common stock, of which the Long Corporation held all but three shares, and 100 shares of $100 par preferred stock which were held entirely by the Federal Housing Administration (R. 106).

Under the terms of its charter, appellee is prohibited from engaging in any business "other than the construction and operation of a rental housing project or projects" so long as any of its property is subject to a mortgage insured by the Federal Housing Commissioner (R. 103). It is also prohibited from renting its "dwelling accommodations" for periods of more than three years, or at a "maximum average rental per room per month" higher than approved by the Federal Housing Administration (R. 104).[1] In addition, without Administration approval, it may not "require as a condition to the occupancy or leasing of any unit in the project the payment * * * of any amount other than the payment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the covenants of the lease" (Pl. Ex. 19, R. 43, 187). Moreover, without Administration approval, appellee may not charge tenants additional amounts for furnishing facilities or services not included in their leases (R. 104–105).

The charter also provides that it shall constitute a default by appellee if, for fifteen days, it fails to per-

[1] This and all other powers afforded the Administration under appellee's charter result from the Administration's ownership of appellee's preferred stock.

form any of the required "conditions or provisions" of the charter, the corporate by-laws, the mortgage or any contract between the mortgagor and the Commissioner of the Federal Housing Administration (R. 104). In case of default, the Administration may "remove all existing directors of the corporation, and * * * elect new directors in their stead; provided, however, that one of said directors shall be the owner or holder of one or more shares of common stock". When the default is cured, the holders of the common stock may once again elect directors (Pl. Ex. 19, R. 43, 186).

On December 7, 1949, appellee executed, in favor of the Echo Fire and Title Insurance Company, on standard Federal Housing Administration forms, a promissory note for $1,357,700 secured by a mortgage on the apartment building. (R. 3–4).[1] The mortgage was initially endorsed by the Federal Housing Administration for insurance purposes on December 30, 1949, subject to "Section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner" in effect on that date (R. 106–107). It was again endorsed, after the completion of the apartment building, on September 12, 1951 (R. 72).

The apartment building was completed in July, 1951 (R. 107) and, on September 10, 1951, appellee submitted to the Federal Housing Administration a proposed schedule of monthly rents for each of five

[1] The court below noted that "[i]t has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11" (R. 103).

different types of apartments. There was no indication that any of the apartments would be furnished (Pl. Ex. 24–A, R. 43, 193–194). The schedule was approved by the Administration on September 13, 1951 (R. 107).

Starting on October 9, 1951, and without seeking to obtain the Administration's approval, the Long Corporation, holder of 1996 of appellee's 1999 shares of common stock, furnished a number of appellee's apartments at a cost of $850–$900 per apartment (R. 67, 107, 108). Tenants of these furnished apartments were charged approximately fifteen to twenty dollars per month, payable to the Long Corporation, in addition to the schedule-approved apartment rentals (R. 56).

In February, 1952, again without applying to the Administration for permission, appellee began offering furnished efficiency apartments to transients on a daily basis, at six dollars per day (R. 56, 62, 107–108), more than half of which was paid to the Long Corporation for "furniture rental" (R. 64). In other words, the Long Corporation received "about $90 a month" from transient rental of a furnished efficiency apartment, if occupied for substantially the entire month, whereas it received only fifteen to twenty dollars a month from a permanent tenant of a similar apartment (R. 56).

On April 1, 1952, appellee submitted to the Federal Housing Administration a Rental Housing Occupancy Report, required of all Section 608 mortgagors. The instructions printed on the form required that, in a

column entitled "total units completed", "[f]urnished units, if any, for each size and rental rate should be designated by an 'F' * * * after the number of such units". Although a number of apartments had been furnished for approximately six months, there was no showing of this in the report. Similarly, there was no indication that apartments were being rented on a daily basis. (Def. Ex. 4b.)

On January 4, 1955, the Federal Housing Administration, having learned of appellee's practice of transient rentals, notified appellee that, while it could continue leasing furnished apartments if it submitted an acceptable schedule of furniture rentals, transient occupancy must be discontinued (R. 16–17, 109).* Although appellee replied that it was "desirous of cooperating with your Administration in every reasonable way", it declined to sign a statement requesting permission to rent furnished apartments and agreeing not to offer any apartments for occupancy of less than thirty days (R. 17–19, 109). Appellee also asked to be advised of the legal authority prohibiting it from offering apartments on a transient basis (R. 18, 109). On January 18, 1955, the Federal Housing Administration informed appellee that Section 513 of the Housing Act of 1954 expressly prohibits tran-

* In December, 1952, the Administration, after learning that appellee was renting furnished apartments, had requested that it submit a rent schedule making full disclosure and sign an agreement not to rent to transients. Appellee did not comply and the matter was not pursued. Apparently the Administration did not then know that appellee, for almost a year, had been making furnished apartments available to transients. (R. 108.)

sient occupancy of apartments in Section 608 housing projects (R. 19–21, 109). However, the Administration again suggested that there would be no objection to appellee's continued leasing of furnished apartments, other than for transient occupancy, provided the furniture rentals were reasonable and appellee agreed not to offer apartments for periods of less than thirty days (R. 20, 109).

3. The proceedings below

In its amended complaint, filed March 10, 1955 (R. 1–21), appellee sought a declaratory judgment that, so long as apartments are available for extended tenacies and the building is operated principally for residential use, it may continue to offer furnished apartments for transient occupancy if "it complies with the terms of the Housing Act in existence at the time of its incorporation, construction of its said building and insurance of the mortgage on the building by the [Administration]". In addition, an order was sought directing the Administration to cease "interfer[ing] with and hampering and hindering of the plaintiff's rightful operation of its apartment project" (R. 15).

The gravamen of the complaint was that appellee had a right, prior to the enactment of the Housing Act of 1954, to rent its apartments for periods of less than thirty days (R. 9) and that Congress, by the 1954 Act, could not constitutionally deprive it of that right (R. 9). Appellee also asserted that the 1954 Act is inapplicable to it, and is discriminatory, arbitrary, unjust and inequitable in view of the provisions (a) authorizing rentals to transients in areas determined

by the Commissioner to be "resort areas", and (b) permitting owners or operators of hotels to obtain injunctions against mortgagors who engage in practices violating the 1954 statute (R. 13–14).

Appellant filed a cross-complaint asking for an order enjoining appellee (a) from renting any accommodations for any term less than thirty days; (b) from charging rent in excess of the schedule approved by the Commissioner; (c) from renting furnished apartments and supplying services without the written approval of the Commission; and (d) from advertising or holding out transient or guest accommodations (R. 22–27).

After holding hearings, Judge Hoffman,[10] sitting as a single judge, held that, prior to 1954, appellee had had the right to rent its apartments for periods of less than thirty days (R. 112) and that Congress lacked the constitutional power to take away that right (R. 116). Therefore, he concluded, the Administration may not "prohibit the rental of a reasonable number of apartments in The Darlington for periods

[10] On August 25, 1955, Judge Hoffman, on the pleadings, requested the convening of a three-judge district court "pursuant to 28 U. S. C. A. § 2284" because he concluded that an examination of the constitutionality of Section 513 of the Housing Act of 1954 was unavoidable (R. 32–33). On August 29, 1955, Chief Judge Parker convened a three-judge district court (R. 34–35). However, that court dissolved itself and returned the case, for hearing, to Judge Hoffman (R. 36–39) because it concluded that "the real question involved is one of statutory interpretation rather than the validity of the statute" (R. 37–38), and in any case, because the granting of an injunction would not be proper, since it would simply be an injunction to enjoin the Administration from securing an injunction. 134 F. Supp. 337 (R. 38).

of less than thirty (30) days, as long as priorities are maintained for the persons entitled thereto and no proper person desiring occupancy for a period of thirty (30) days or more is thereby precluded from obtaining accommodations" (R. 120). However, recognizing that the Federal Housing Administration at all times had the power to pass on maximum rentals of furnished as well as unfurnished apartments, Judge Hoffman enjoined appellee from renting furnished apartments until a rent schedule covering such apartments was approved (R. 111, 121),[11]

In addition, Judge Hoffman expressed the view that the 1954 Act was discriminatory against rental housing projects, such as that of appellee, which are not in "resort areas" (R. 119–120), and that the statute "is designed to afford relief for private interests, as distinguished from public purposes" (R. 120). He did not, however, rely upon these considerations in holding the 1954 Act unconstitutional in its application to appellee.

Upon direct appeal, pursuant to 28 U. S. C. 1252, this Court noted probable jurisdiction; reversed Judge Hoffman's judgment on the ground that, under

[11] Noting the fact that the furniture was owned by the Long Corporation, rather than appellee itself, Judge Hoffman, dismissed the distinction with the observation that the "rather ingenious scheme is a mere subterfuge" with which he had "no patience." (R. 111.) The decree also declared that appellee has no right to advertise its willingness to accept transients, nor to obtain a license to operate as a hotel. However, as to these matters no injunction was required, in Judge Hoffman's view, since the Federal Housing Administration had not contended that appellee advertised for transient occupants (R. 121).

28 U. S. C. 2282, an injunction restraining the enforcement of an Act of Congress for repugnance to the Constitution cannot be granted by a single district judge; and remanded the case for consideration by a three-judge district court. 352 U. S. 977.

Upon remand, the three-judge district court, with a minor correction,[12] adopted Judge Hoffman's findings and conclusions. 154 F. Supp. 411 (R. 127–130). However, in permitting appellee to offer apartments for transient occupancy, the court imposed the following conditions: (a) no more than 15 per cent of appellee's apartments may be made available for occupancy for periods of less than 30 days; (b) the rentals for furnished apartments may not be increased; (c) appellee may not advertise itself as a "hotel" nor otherwise solicit transient business; and (d) appellee may provide neither food and beverage room service, nor regular bell boy service (R. 131).

SUMMARY OF ARGUMENT

The holding of the court below that Section 513 of the National Housing Act is unconstitutional in its application to appellee rested upon the preliminary determination that, prior to the enactment of the Section in 1954, appellee had been entitled to rent its apartments to transients. We submit that the premise is erroneous and that, therefore, there is no necessity to reach the constitutional issue. We argue further

[12] Judge Hoffman erroneously stated that, in leasing apartments, the National Housing Act requires that preference be given to both veterans and war workers (R. 112). In fact, war workers do not receive preference under the 1946 amendment.

that, even if rental to transients had been permissible at the time the mortgage on appellee's project was insured, there would be no constitutional objection to the application of Section 513 to appellee.

I

A. In Section 513 (a), Congress formally declared in 1954 that it had been its intent, since the enactment of the National Housing Act, that insured projects, such as that here involved, were not to be used for transient or hotel purposes. This declaration is entitled to great weight in the construction of Section 608 of the Act, under which appellee's project was insured. This is especially so in view of the legislative history of Section 513 (a), which discloses that both the Senate and the House Committees gave careful consideration to the terms of the declaration.

B. The legislative history and background of Section 608 bear out the declaration; they show that, from the beginning, the purpose of Congress was to provide permanent housing. Federal insurance of mortgages covering multi-family rental housing projects was first authorized in 1934, by Section 207 of the National Housing Act. That provision was adopted to remedy the severe housing shortage resulting from the depressed condition of the building trades industry. In 1942, Section 608 was enacted to provide rental housing for war workers. In order to stimulate residential construction, Section 608 raised the insurable mortgage limit from 80 per cent of appraised value to 90 per cent of reasonable replacement cost, with the qualification that war workers must

receive occupancy preference. In 1946, Section 608 was amended as part of the veterans' emergency housing program, so that veterans, instead of war workers, became the recipients of the occupancy preference. Nowhere in the legislative history and background of either Section 608 or its predecessor is there the remotest suggestion that housing projects subject to federally insured mortgages may be operated to accommodate transients.

C. The administrative regulations, which have been in effect since long before appellee's project was insured, demonstrate that the Federal Housing Administration has consistently construed Section 608 as not entitling a project owner to rent apartments to transients. This interpretation by the body charged with the administration of the National Housing Act may be overturned only if the statutory test is so plain and unambiguous "as to leave nothing for construction". *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

D. Appellee's own charter bears witness that the use of the project for transient rental was neither contemplated nor authorized. The charter terms indicate that the units were to be rented on a monthly (or longer) basis.

II

Even if appellee was not prohibited from renting its apartments to transients prior to the 1954 enactment of Section 513, it has been expressly prohibited from doing so since that time. This prohibition is valid as applied to mortgages insured prior to the enactment. There is no constitutional objection to

retrospective legislation in general, nor specifically to Congressional legislation affecting existing contracts. And the application of Section 513 to existing mortgages does not offend due process.

If, prior to 1954, appellee had a right to assume that it might rent its apartments to transients, this "right" was based, at most, on the *absence* of an express prohibition, rather than on a "clearly and unequivocally expressed" authorization. *Keefe* v. *Clark*, 322 U. S. 393, 396–397. Moreover, there is no showing that appellee in any way relied upon such an assumed right in entering its mortgage insurance contract. Therefore, the "right," which, at the least, was always open to substantial question, is hardly among the "practical and substantial rights" which the Constitution was "intended to preserve". *Davis* v. *Mills*, 194 U. S. 451, 457. While Congress carved out an exception to its prohibition against transient renting for those mortgagors which, prior to 1954, had applied for and received Federal Housing Administration permission to rent to temporary occupants, due process did not require that this gratuitous exception be extended to appellee, which had rented to transients without the Administration's approval.

ARGUMENT

The court below has held that Section 513 of the National Housing Act, added in 1954, which expressly prohibits transient rentals in insured projects, is unconstitutional in its application to appellee. Underlying the holding is the premise that, prior to the passage of the 1954 Act, such rentals were permissible.

In Point I below, we argue that this premise is erroneous and that there is accordingly no necessity for this Court to reach the constitutional issue.[13] In our view, the same prohibition against transient rentals which is contained in Section 513 was in effect when appellee's mortgage was insured, in 1949–1951, by the Federal Housing Administration. We rely upon (1) the 1954 formal congressional declaration respecting the purpose of Section 608 of the National Housing Act; (2) the legislative background of Section 608 itself; and (3) the pertinent administrative regulations. Additionally, insofar as this particular appellee is concerned, its own charter reflects the prohibition.

In Point II, we urge that, even if rentals to transients had been permissible at the time the mortgage here involved was insured, there would be no constitutional objection to the application of Section 513 to appellee.

I. The National Housing Act and pertinent regulations in effect on December 30, 1949, as well as appellee's charter itself, prohibit rental of appellee's dwelling units to transient occupants

A. Congress has formally declared that the purpose of the National Housing Act excludes the use of insured housing for transient occupancy

Section 513 (a) of the 1954 Act contains this formal congressional declaration respecting the underlying purpose of the National Housing Act:

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[13] Cf. *Peters* v. *Hobby*, 349 U. S. 331, 338; *Neese* v. *Southern R. Co.*, 350 U. S. 77, 78; *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 122; *United States* v. *International Union, U. A., A. & A. I. W.*, 352 U. S. 567, 590; *United States* v. *Witkovich*, 353 U. S. 194, 201–202.

> The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

It was under the terms of Section 608 of that Act, as amended in 1946, that the mortgage on appellee's project had been insured.

1. This Court has frequently looked to subsequent legislation "to assist in the interpretation of prior legislation upon the same subject," *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309. See, *e. g.*, *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262 (1906 and 1909 statutes used to construe 1875 statute), *United States* v. *Bowling*, 256 U. S. 484 (1914 statute used to construe 1910 statute), *New York, P. & N. R. R. Co.* v. *Peninsula Produce Exch. of Md.*, 240 U. S. 34 (1914 statute used to construe 1906 statute), and *Bailey* v. *Clark*, 21 Wall. 284 (1872 statute used to construe 1866 statute). And when, as in the present case, the subsequent legislation expressly declares the intent of the prior legislation, it is entitled to "great weight" in construing the earlier statute, *United States* v. *Stafoff*, 260 U. S. 477, 480. See, also, *First National Bank* v. *Missouri*, 263 U. S. 640, 658.

Perhaps the most striking use of subsequent congressional action to ascertain prior legislative intent was this Court's use of a later committee report in *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317. That case involved a suit for compensation for

land, based on the General Allotment Act of 1887 which, *inter alia,* authorized the President to allot reservation land, in severalty, to Indians living on the particular reservation. In 1892, five years after the General Allotment Act was passed, the Senate Committee on Indian Affairs, in reporting a wholly unrelated bill, commented that "[a]n erroneous idea seems to have grown up, that the Indian allotment act and its amendments have * * * operated to confer titles upon the Indians * * *. It would be preposterous to place such a construction upon the language of this act * * *." This Court, in affirming denial of the Indian claims, said that "[t]his statement by the Committee which reported the General Allotment Act of 1887, made within five years of its passage, is *virtually conclusive* as to the significance of that Act" (emphasis added), *id.* at 329–330. Even though the subsequent declaration was only a part of a committee report, it "virtually" bound this Court because the statute had been passed only five years before and because the declaration was made by the same Committee which had considered the act."

2. Although the declaration in the 1954 Act may not be conclusive as to the import of the 1946 legislation, there is substantial reason for according it particular respect. The National Housing Act was reviewed and amended at least once each year between

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"Of course, subsequent Committee declarations cannot override "the contemporaneous intent of the Congress which enacted" the legislation, *Fogarty* v. *United States*, 340 U. S. 8, 13–14.

1946 and 1954,[15] and, therefore, consideration of its purposes was continually before Congress. Moreover, the 1954 hearings and reports of the House and Senate Committees on Banking and Currency, both of which had also acted upon the 1946 legislation, disclose a careful scrutiny of the terms of the declaration. For example, during the hearings of the House Committee, the Chairman, Representative Wolcott, who had been the ranking minority member of the Committee in 1946,[16] stated that "it was never the intent of Congress that the FHA would insure a commercial property. We had a lot of deliberation on that question before this committee and we have never gone into the commercial field, in FHA, and we surely wouldn't want to set up a situation * * * where Government moneys were used to set up competition for privately financed industries * * *." *Hearings before the Committee on Banking and Currency*, House of Representatives, 83d Cong., 2d Sess., on H. R. 7839, p. 514. Similarly, Representative Kilburn, also a member of the House Committee on Banking and Currency in 1946,[17] observed that "if we pass legislation to help housing for the country, * * * it doesn't mean that we are passing legislation to increase competition for hotels. That isn't housing." *Id.*, at p. 513.

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[15] The Act of 1954 was the twenty-sixth amendment of the National Housing Act since the Veterans Emergency Housing Act of 1946. See *National Housing Act As Amended*, Revised Aug. 30, 1957 (FHA-107), Part II.

[16] *Congressional Directory*, 79th Cong., 2d Sess., p. 200.

[17] *Ibid.*

This conclusion was emphasized by both committees in their reports. The House Report states:

> The rental insurance programs of the National Housing Act are designed to provide rental accommodations for family use. The mortgage loans insured are amortized by monthly payments of principal and interest derived from monthly rental income. A project is not insured unless the FHA has determined there is an adequate need for such accommodations in the community. The programs are not designed to cover hotels, nor is the insurance of hotel properties permitted. The fact that a project has been insured should therefore be a prohibition to rental on a transient basis. [H. Rept. No. 1429, 83rd Cong., 2d Sess., p. 17]

And the Senate Report contains the Committee's opinion:

> * * * that the benefits provided under the National Housing Act were designed to increase the supply of permanent residential housing, not to increase the supply of hotels or motels or similar establishments catering to nonpermanent residents.
>
> Your committee does not believe the spirit of this intent is violated by the operation of a commercial establishment included to serve the needs of families residing in rental projects operated as permanent residential housing projects (as distinguished from those operated to provide transient accommodations) but it firmly believes that the operation of such establishments should not be conducted in such a manner as to convert the use of all or any portion of

> the housing units in the project from permanent, residential use to a project furnishing transient accommodations. * * * [S. Rept. No. 1472, 83rd Cong., 2d Sess., p. 31].

In short, Section 513 of the National Housing Act of 1954, which explained that the purpose of Congress in 1946 excluded the use of Section 608 housing "for transient or hotel purposes while such insurance on the mortgage remains outstanding," is highly persuasive that the Act of 1946 did not permit Section 608 rental project owners to offer their apartments for transient occupancy.

B. The legislative background and history of the 1946 Act confirm the conclusion that projects insured under Section 608 are not to be occupied by transients

Viewed within the framework of an extensive legislative history, Section 608 manifests a single dominant aim: facilitating residential construction for families. Indeed, the court below apparently conceded that this was "the primary intent of Congress" (R. 115). Not only is the notion of renting such residential dwelling units to transients repugnant to this underlying purpose; it is hardly conceivable that Congress intended to permit federally supported rental housing projects to operate to the obvious competitive disadvantage of hotels which were built without the considerable assistance of "90% to 100% financing guaranteed by an agency of the United States" (R. 114). The history fully warrants indulgence of the normal assumption that Congress intended to pursue its "overriding public policy" (increase in the supply of permanent housing) "with the least possible harm to citizens". *Otis & Co.* v.

Securities and Exchange Commission, 323 U. S. 624, 637, 638.

1. Section 608, as amended in 1946, is derived from Section 207 of the National Housing Act of 1934, 48 Stat. 1246, 1252. It has been estimated that, in the spring of 1934, about one-half of the Nation's real estate mortgages were in default and that virtually all sources of new mortgage money had dried up. 38 Op. Atty. Gen. 258, 264. At a time when housing was inadequate for an expanding population,[18] and many homes "in decadent condition and not fit for human habitation" were in need of "repairing and modernizing to bring them up to the standard of the times,"[19] the building industry was immobilized. Construction of non-farm dwelling units in 1933 had dropped to less than 8 percent of the 1920–1929 average, and construction of multi-family structures within that classification had decreased by an even greater percentage.[20] The results were inadequate repair of existing houses, sharing of quarters by many families, and extensive unemployment in the building trades industry.[21]

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[18] "The construction of housing facilities has not kept pace with either the needs or growth of the population * * *." Report on National Housing Amendments of 1937, H. Rept. 1655, 75th Cong., 2d Sess., p. 1.

[19] Message from President Roosevelt, May 14, 1934, 78 Cong. Rec. 8739.

[20] S. Rept. 1300, 75th Cong., 2d Sess., p. 2. Sources: National Bureau of Economic Research, 1920–35; Federal Housing Administration, 1936; Federal Housing Administration, Division of Economics and Statistics, Table No. 21 (revised Nov. 16, 1937).

[21] *Id.* at pp. 2–3.

Therefore, in order "to encourage improvement in housing standards and conditions, [and] to provide a system of mutual mortgage insurance," Congress enacted the National Housing Act, which in Section 207, 48 Stat. 1246, provided:

> The Administrator may also insure first mortgages * * * covering property held by Federal or State instrumentalities, private limited dividend corporations, or municipal corporate instrumentalities of one or more States, formed *for the purpose of providing housing, for persons of low income* which are regulated or restricted by law or by the Administrator as to rents, charges, capital structure, rate of return, or methods of operation. * * * [Emphasis added.]

This section was expanded by the National Housing Act Amendments of 1938, 52 Stat. 8, 16, which limited the amount of the mortgage to 80 per cent of the appraised value (Sec. 207 (c)) and permitted participation by "private corporations, associations, cooperative societies which are legal agents of owner-occupants, or trusts formed or created *for the purpose of rehabilitating slum or blighted areas, or providing housing for rental or sale.* * * *" (Emphasis added.) (Sec. 207 (b) (2).) Thus, the purpose of Section 207 was expanded from "providing housing for persons of low income" to "rehabilitating slum or blighted areas, or providing housing for rental or sale." This was a broad program for social and economic betterment and it is impossible to read into it even a collateral purpose to aid the financing of rental units for transient occupancy.

2. In 1942, Congress was faced with a critical problem of housing millions of workers moving into areas of war industry.[22] Although many were housed in temporary quarters, such as tourist camps, and in dormitories, it was apparent that there was a need for at least 200,000 permanent family units.[23] Consequently, in order to encourage builders to construct permanent rental projects for family units, Congress enacted Section 11 of the National Housing Act Amendments of 1942, which introduced a new Section 608. 56 Stat. 301, 303.

In three respects, Section 608 differed from Section 207. First of all, Section 608 gave much greater discretion to the Federal Housing Administration so as to introduce far more flexibility than existed under the carefully defined rules of Section 207.[24] Secondly, and even more important from the standpoint of expediting the construction of permanent family units, the authorized mortgage limit was increased from 80

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[22] In April 1942, the National Housing Agency Administrator estimated that, until July 1, 1943, there would be a need for providing accommodations for 1,600,000 workers moving into areas of war industry. Hearings before Subcommittee of the Senate Committee on Banking and Currency on H. R. 6927, 77th Con., 2d Sess., p. 5. It has also been estimated that, from 1941 to 1945, four million workers, many with families, migrated to war centers. *The Housing Situation, The Factual Background* (Housing and Home Finance Agency, 1949, p. 16).

[23] Hearings before Subcommittee of the Senate Committee on Banking and Currency on H. R. 6927, 77th Cong., 2d sess., p. 5.

[24] Testimony by the Federal Housing Commissioner, Hearings before the Subcommittee of the Senate Committee on Banking and Currency on H. R. 6927, 77th Cong., 2d Sess., p. 13.

per cent of appraised value to 90 per cent of reasonable replacement cost (Sec. 608 (b) (3) (B)). Thirdly, the mortgaged property was to "be designed for rent for residential use by war workers" (Sec. 608 (b) (2)). The Administration was authorized, at the same time, to prescribe procedures to insure that war workers received priority in occupancy (Sec. 603).

In all other respects, Section 608 was virtually identical with Section 207.[25] Nowhere in the legislative history of the National Housing Act Amendments of 1942 is there the slightest suggestion that the mortgaged property could be used for transient occupancy.

3. The return of veterans after World War II precipitated a housing crisis requiring the construction of over three million new housing units during 1946 and 1947.[26] At the beginning of 1946, 1,200,000 families were sharing dwellings with other families,[27] and it was predicted that, despite the veterans' emergency housing program, an additional 758,000 families would be sharing living accommodations at the end of 1947.[28] Many veterans, uncertain of their future income and permanent location, preferred to rent rather than buy homes,[29] especially since they believed prices of existing homes were inflated.[30] Therefore, although Sec-

[25] See S. Rept. No. 1300, 77th Cong., 2d sess., p. 2; H. Rept. No. 2039, 77th Cong., 2d Sess., p. 2.

[26] Remarks by Senator Barkley, 92 Cong. Rec. 3265; see, also, S. Rept. 1130, 79th Cong., 2d Sess., p. 2; H. Rept. 1580, 79th Cong., 2d Sess., p. 4.

[27] *Ibid.*

[28] S. Rept. 1130, 79th Cong., 2d Sess., p. 2.

[29] *Id.* at 9.

[30] Remington, *The Veterans' Emergency Housing Program*, 12 Law and Contemporary Problems 143 (1947).

tion 608 had been enacted in 1942 as "temporary war legislation,"[31] it was retained in 1946 as part of a program "to accelerate the production of houses with preferences for veterans of World War II and at sales prices or rentals within their means," 60 Stat. 207, 208. Of course, the occupancy priority in Section 608 projects afforded to war workers under the 1942 Act was deleted, and priority was given instead to "veterans of World War II and their immediate families" (Sec. 10 (f)).

Once again, it is plain that the purpose of Congress was to provide permanent housing for millions of persons who were inadequately housed. There is no indication of Congressional concern for transient accommodations. And certainly there is not the remotest suggestion that Congress intended to permit Section 608 housing projects to compete with hotels for transient occupants.

C. The Federal Housing Administration has uniformly interpreted Section 608 as not entitling owners of insured projects to rent to transients

Beginning in 1947, long before appellee's project was approved by the Federal Housing Administration, Section 608 was administratively construed as not permitting rental to transients. This construction, contemporaneously adopted and consistently applied, is to be given great weight. Indeed, it could be overturned only if the statutory text were so plain and unambiguous "as to leave nothing for con-

[31] Testimony of the then Federal Housing Commissioner before the Subcommittee of the Senate Committee on Banking and Currency on H. R. 6927, 77th Cong., 2d Sess., p. 10; see, also, pp. 12–13.

struction." *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Associations*, 310 U. S. 534, 549; *United States* v. *Public Utilities Commission*, 345 U. S. 295, 314–315. Moreover, the regulations manifesting the administrative view were incorporated (by reference) in the contract of insurance pertaining to appellee's project.

1. At the time that appellee's mortgage was initially approved for insurance by the Federal Housing Administration, the regulations required that the mortgagor be "[a] corporation or trust formed or created, with the approval of the Commissioner, *for the purpose of providing housing for rent or sale*," which, so long as the insurance remains in effect, may "*engage in no business other than the construction and operation of a rental housing project or projects.*" (Emphasis added; 24 C. F. R. 280.26 (a).) Additionally, the regulations stipulated that:

> * * * At the time the mortgage is insured the mortgagor shall have constructed and completed or shall be obligated to construct and complete new *housing* accommodations on the mortgaged property *designed principally for residential use*, conforming to standards satisfactory to the Commissioner, and consisting of not less than eight (8) rentable *dwelling* units on one site and may be detached, semidetached, or row houses, or multifamily structures. [Emphasis added; 24 C. F. R. 280.34.]

The court below construed the words "designed principally for residential use," as used in 24 C. F. R. 280.34, to include transient rentals, and consequently concluded that catering to temporary occupants is not

a "business other than the * * * operation of a rental housing project." This construction is inconsistent with the context in which that phrase is used in the regulations implementing Section 608. Moreover, it is inconsistent with the uniform administrative interpretation of the phrase in relation to both 24 C. F. R. 280.34 and earlier Administration rules pertaining to mortgages insured under Title II of the National Housing Act.

(a) The phrase "designed principally for residential use," appearing in 24 C. F. R. 280.34, is followed by the words "* * * consisting of not less than eight (8) rentable *dwelling* units." The word "dwelling" denotes a permanent residence. *Schwarzschild* v. *Welborne,* 186 Va. 1052, 1058–1059, 1064–1065; *State* v. *McGrath,* 116 N. E. 2d 218 (Ohio Court of Appeals). It "involve[s] the idea of a house, a residence, where persons live in settled abode," *Barnett* v. *Vaughan Institute,* 134 App. Div. 921, 119 N. Y. S. 45, 46. Thus, a hotel or other place of mere temporary lodging is not a dwelling. *Thomas* v. *Commercial Union Assur. Co.,* 162 Mass. 29, 33; *DeWolf* v. *Ford,* 193 N. Y. 397, 402; *Woodstock* v. *The Retreat, Inc.,* 125 Conn. 52, 59.

(b) Long before the enactment of Section 608, the requirements for mortgage insurance under Title II of the National Housing Act prescribed that "[t]he dwelling shall be designed primarily for residential purposes."[22] The requirements in addition specified the permissible limits of nonresidential use as

[22] *Property Standards* (F. H. A. No. 2019; revised February 15, 1935), p. 10.

"twenty-five percent (25%) of the net rentable floor area of the building * * * designed or used for industrial, commercial, or professional occupancy."[33] The qualification "designed principally for residential purposes" was thus inserted in the earlier rules to indicate that mortgages would be insured even though the buildings contained stores, restaurants, doctors' offices, etc.

As employed in 24 C. F. R. 280.34, the phrase similarly was intended to reflect that the Administration would approve the insurance of "multifamily housing projects in which space is set aside for commercial facilities, catering to the resident families."[34] The Administration has never interpreted this language as permitting transient accommodations (R. 244).[35] On the contrary, it has consistently ruled that tran-

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[33] *Ibid.*

[34] Affidavit of Norman P. Mason, Commissioner of the Federal Housing Administration (R. 33).

[35] Affidavit of Adolphus M. Prothro, a staff member of the Legal Division of the Administration since 1937, and currently the Director of that Division (Def. Ex. 6; R. 54, 244). In answer to a question by counsel concerning the purpose of "carrying this language," Mr. Prothro stated:

"The primary purpose is to avoid those questions which might come up if we said only residential use. There would be a question about whether if there is going to be a doctor's office in the building, whether we could properly insure that mortgage, or if there is going to be a parking lot facility in connection with it, whether we could properly insure that mortgage. In the small home field like a single family home where we use that same language, we are not even thinking about hotels of course; we are thinking about such things as maybe some outbuildings in a suburban area where a person might park his plumber's truck, or he might keep some pet rabbits that he is raising, or something of that sort, and sell the rabbits. Then there is a combination there, to be a slight combination of commercial with residential. Now, we feel that

sient rentals are prohibited, at least in the absence of Administration approval (R. 92).

(c) For the express purpose of enabling applicants for Section 608 mortgage insurance to ascertain what types of rental housing projects were "contemplated by the National Housing Act and preferred by the Federal Housing Administration," the Federal Housing Administration, in September 1947, revised its instruction booklet, entitled *Planning Rental Housing Projects* (Pl. Ex. 31; R. 44, 226; App. C, *infra*, pp. 58–59). The instructions began with this interpretation of the word "housing":

> [D]welling quarters for families—quarters which offer complete facilities for family life. A large variety of project types is possible: groups of single-family dwellings, row or group houses, row flats, walk-up apartments, and elevator apartments. Depending upon circumstances, any of these may occur not far from business districts of a city, or in less densely populated areas, or in its suburban sections.

It was then indicated that projects with the following characteristics were to be preferred:

> 1. Location in a distinctly *residential* area, which promises to retain good character.

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when we value those properties that we need some language like this in the statute to protect us against criticism later on or against actual violation of the statute. The only exception being the Title VIII program, which is the military program, we carry only the word "residential" use there; not "principally for residential use" because that housing is built on a military base where Congress clearly did not want us to insure any commercial facility—no store, no dentist office or anything of that sort." [R. 94–95.]

> 2. A type of living unit that will appeal to a *long-term rather than a temporary occupant.*
>
> Income from *dwellings* adequate to assure the financial success of the project, with income from the rental of garages, stores, and other facilities only a minor factor. [Emphasis added.]

* * * * *

In this connection, it was made clear that "[*r*]*ental housing projects in distinctly commercial areas, hotels, apartment hotels, dormitories,* [*and*] *club buildings partly devoted to residential use* * * * *are not considered acceptable,* as they lack these characteristics." (Emphasis added.) App. C, *infra,* p. 59.

(d) Still further indication that the court below misconstrued the administrative regulations is to be found in the "application for mortgage insurance under Section 608 of the National Housing Act" (Pl. Ex. 17), revised by the Federal Housing Administration in May 1946. The applicant was required to estimate the annual operating expenses of its proposed housing project. The expenses listed were: elevator power, elevator maintenance, fuel, janitors' supplies, lighting and miscellaneous power, water, gas, garbage and ash removal, and wages for engineers, janitors, porters, handymen, groundskeepers, watchmen and other operating personnel. Significantly, the list does not include linen supply, the expense of cleaning apartments and the many other costs which are incidental to the provision of transient accommodations.

2. The policy against transient rentals was maintained during the entire period from 1946 until 1954.

This is evidenced by a series of letters from the Assistant Commissioner of the Administration to the Directors of the field offices (R. 241–244, 247–250). On August 10, 1951, a month prior to appellee's submission of its proposed rent schedule, the Administration authorized Field Directors to permit rental of furnished apartments so long as the furniture rental charge was "not more than 1/48th of actual cost" of the "basic items of furniture." (Def. Ex. 10; R. 69, 247.) By limiting the rental charge to the cost of basic items such as "rugs, chairs, sofas, beds, bureaus, etc., necessary for comfortable occupancy, as distinguished from such items as linens, china, cutlery, or similar items, necessary for complete living accommodations" (R. 248–249), the Administration precluded the use of furnished apartments for transient occupancy. Indeed, the Administration carefully pointed out to the Field Directors that, "in considering rent schedules and methods of operation proposed by mortgagors," they should:

> * * * bear in mind that the objective of this Administration is the production of housing designed for occupancy of a relatively permanent nature and that *transient occupancy is contrary to policy. No approval will be granted with respect to a proposal anticipating transient occupancy.*[36] [Emphasis added; R. 250.]

[36] As to furnished apartments generally, the letter stated, "No charge shall be made by the mortgagor against tenants in addition to those established by a rent schedule approved in accordance with the foregoing formulae, *nor shall the owners* or representatives of the mortgagor, *either by themselves personally or through entities controlled by them*, be permitted by

Subsequent to the letter of August 10, 1951, the Administration learned that some Section 608 rental housing projects were still "catering to transient occupancy" (Def. Ex. 1; R. 53, 241). Therefore, on January 3, 1952, the Administration found it "necessary to supplement and expand" its earlier directive by providing that "no approval will be granted for furniture rentals in any rental housing project unless the Director * * * is firmly of the opinion that furniture is essential to obtain satisfactory occupancy, and approval of furniture rentals will be given then only in the event of prior agreement by the mortgagor not to accept any tenancy for a period of less than 30 days" (R. 242).

In sum, from the inception of the program to increase rental housing for veterans, the Federal Housing Administration has consistently construed the National Housing Act as not entitling Section 608 project owners to rent their dwellings to transients. It is true that in approximately twelve to fifteen instances (R. 112) the Administration specifically approved transient occupancy. This approval did not, however, stem from a belief that project owners had the right, under either the 1946 Act or the implementing regulations, to rent to transients. Rather, the Administration was simply purporting to invoke the authority granted to the Commissioner to regulate the mort-

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way of subterfuge or otherwise to make additional charges against tenants with respect to facilities or services provided at the project. If tenants desire services in addition to those contemplated in the establishment of the rent schedule they are expected to make arrangements for the same independently and on their own behalf." (R. 249; emphasis added.)

gagor's methods of operation. It did so in the belief that, in these particular and limited instances, transient rentals were "in the public interest, in the interest of the Government's financial interests, and in the interest of the community in which the structure existed in which there was no demand for apartment rentals" (R. 92). It is to be noted in this connection that Section 513 (b) of the 1954 Act granted an exception to owners of Section 608 projects who, unlike appellee, had applied for and received such approval.

D. Appellee's own charter contemplates that its housing units are not to be rented to transients

As is seen from its terms, appellee's corporate charter, consonant with the National Housing Act and the pertinent regulations, contemplates that apartments in appellee's project may be rented only to long-term tenants. For example, paragraph 8 (a) (1) requires Administration approval of the "average rental per room *per month* * * * prior to *leasing* or offering for *lease* of any of the *dwelling* accommodations" (R. 189, emphasis added). The italicized words indicate a long-term period of rental, and certainly the wording of the charter cannot be reconciled with the practices followed by appellee with respect to transient occupancy and permitted by the decree of the court below. The transient is "accepted, directed to his room, and, upon leaving, * * * given a receipt" for his payment of "rent" and telephone charges (R. 110). While occupying his furnished quarters, he is provided maid service (R. 230), linen service (R. 64, 230) and utilities (R. 64). Clearly the relationship be-

tween appellee and its transient occupants is not based on a lease, one of the incidents of which is exclusive possession of the rented premises."

Moreover, in addition to the use of the words "dwelling accommodations" (see *supra*, p. 32), the charter expressly declares that, without approval by the Federal Housing Administration, appellee may not "require as a condition to the occupancy or leasing of any unit in the project the payment * * * of any amount other than the payment of the first month's rent plus a security deposit * * * not in excess of one month's rent to guarantee the performance of the covenants of the lease" (Pl. Ex. 19, R. 43, 187). This provision necessarily contemplates that the rental of appellee's apartments shall be for a period of at least one month. *Mason* v. *Rock Creek Plaza*, decided June 30, 1958 (D. D. C.).

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[37] Although no single test may be conclusive, all of the following factors indicate an absence of exclusive possession: the premises were furnished, *Hundley* v. *Milner Hotel Mgt. Co.*, 114 F. Supp. 206, 208 (W. D. Ky.), affirmed, 216 F. 2d 613 (C. A. 6); *Carroll* v. *Cooney*, 116 Conn. 112, 115; maid service was provided, *Martin* v. *Shryock Realty Co.*, 236 Mo. App. 1265, 1270; *Tamamian* v. *Gabbard*, 55 A. 2d 513, 514 (D. C. Mun. Ct. App.); linen was supplied, *Lindsey* v. *Watson*, 83 A. 2d 226, 227 (D. C. Mun. Ct. App.); *Lambert* v. *Sine*, 123 Utah 145, 149; utilities were provided, *Marden* v. *Radford*, 229 Mo. App. 789, 803; *Roberts* v. *Casey*, 36 Cal. App. 2d 767, 772; and telephone charges were paid to appellee, *Goodell* v. *Morris Lansburgh & Associates*, 77 So. 2d 247, 248 (Fla.); *Roberts* v. *Casey*, *supra*. And perhaps the most significant factor showing that the temporary occupants of Darlington apartments do not have exclusive possession of their quarters is the very transiency of their stay, *Hundley* v. *Milner Hotel Myt. Co.*, *supra*; *State* v. *Bowman*, 202 Minn. 44, 46.

II. The express prohibition against transient renting, contained in Section 513 of the National Housing Act of 1954, is constitutional as applied to appellee

Even if there were room for serious doubt (which we dispute) that appellee was prohibited from renting its apartments to transients prior to 1954, appellee has been expressly prohibited from doing so since the passage of the 1954 Act. On its face, Section 513 (d) of that Act forbids transient rentals in *all* projects insured under Section 608, regardless of when insured. That Section reads:

> The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act * * *.

Contrary to the view of the court below, we submit that application of the prohibition to previously insured projects is free from constitutional objection.

The Constitution, of course, "contains no prohibition of retrospective legislation as such, and therefore * * * the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution." *League* v. *Texas*, 184 U. S. 156, 161. Moreover, while states may not "pass any * * * Law impairing the Obligation of Contracts" (Art. 1, Sec. 10, cl. 1), there is no such restriction upon congressional action. Therefore, when Congress, in the exercise of an admittedly granted power, has adopted

a means reasonably adapted to achieve a legitimate legislative end, this Court has sustained such legislation even though the effect may be set aside or reduce the value of accrued contract rights. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240; *Calhoun* v. *Massie*, 253 U. S. 170; *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603; *Wright* v. *Union Central Insurance Co.*, 304 U. S. 502; *Lichter* v. *United States*, 334 U. S. 742; *Block* v. *Hirsh*, 256 U. S. 135; *Bowles* v. *Willingham*, 321 U. S. 503.[*] The Court has pointed out that "when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity," *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 307–308, and that a person who contracts in an area in which the legislature had exercised its power must expect further legislation on the same subject. *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38.

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[*] The Court has likewise sustained the validity of state legislation substantially reducing the value of "vested" contract rights as consistent with the Constitutional prohibitions against state impairment of contract obligations and against deprivation of property without due process, so long as the legislation bears a reasonable relation to a legitimate legislative purpose. *East New York Savings Bank* v. *Hahn*, 326 U. S. 230; *Gelfert* v. *National City Bank*, 313 U. S. 221; *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32; *Honeyman* v. *Jacobs*, 306 U. S. 539; *Richmond Corp.* v. *Wachovia Bank*, 300 U. S. 124; *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170; *Faitoute Co.* v. *Asbury Park*, 316 U. S. 502; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20.

Lynch v. *United States*, 292 U. S. 571, cited by the court below, does not stand for the proposition that the congressional power to modify a contract is destroyed by the circumstance that the United States is a contracting party. In *Lynch*, this Court invalidated, on due process grounds, a statute which completely repudiated obligations expressly assumed in contracts of personal insurance—the very obligation upon which the insured relies in paying premiums—for no reason other than to save the Government money. While recognizing that Congress can annul or amend contractual relations of the United States in proper circumstances, the Court regarded the legislative desire to reduce Government expenditures as insufficient justification for "abrogat[ing] outstanding contracts" and "reliev[ing] the United States from all liability on the contracts without making compensation to the beneficiaries" (P. 579).

No such due process objections can be raised with respect to Section 513. If appellee had any basis for believing that it might rent its apartments to transients prior to 1954, that belief was not founded upon an express congressional or administrative approval, but rested upon the mere *absence* of an express prohibition. Cf. *Perry* v. *United States*, 294 U. S. 330. At best, the legality of transient rentals was speculative and argumentative, not clear or well understood—hardly among the "practical and substantial rights" which the Constitution was "intended to preserve." *Davis* v. *Mills*, 194 U. S. 451, 457. In the view most favorable to appellee, the 1954 amendment simply extended the reach of legislative

regulation, on a matter already subject to legislation, into an area in which appellee had, at most, disputed and unclear rights.

Without a showing that a vested right had been expressly and unquestionably conferred upon appellee, no constitutional objection to Section 513 can be sustained for "[t]he continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation * * *" *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 548. For example, in *Keefe* v. *Clark*, 322 U. S. 393, special assessment drain bonds were issued in 1927 implicitly subject to a statutory provision that the additional assesments would be levied upon the improved properties if there were insufficient funds to pay the principal and interest of matured bonds. In 1937, the Michigan legislature authorized the sale for unpaid taxes of subject land parcels free and clear of all encumbrances. Appellant bond holders contended that the earlier statute had given them an indefeasible right to have a deficiency assessment levied on every parcel of land in the drain district regardless of whether a particular parcel had been sold at a tax sale. Consequently, they argued, the 1937 legislation impaired their contract with the local drain commissioner. This argument was rejected because (at pp. 396–397):

> [b]efore we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political sub-

> division of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be *clearly* and *unequivocally* expressed. * * *
>
> We do not find in the provision of the drain statute relied upon by appellants a *clear* and *unequivocal* purpose of Michigan to permit drain districts to bargain away the State's power to sell tax-delinquent lands free of encumberances. * * * [Emphasis added.]

Moreover, there is no indication that appellee's agents relied upon, or even considered, transient rentals at the time they entered into the insurance contract. Rather, it would seem that this was simply a "mere afterthought" with which "due process of law is not concerned." *Helis* v. *Ward*, 308 U. S. 365, 370.*

Not only does Section 513 *not* deprive appellee of any property without due process; on the contrary, it displays a punctilious legislative respect for "fundamental fairness" (*Lisenba* v. *California*, 314 U. S.

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* In *Perry* v. *United States*, 294 U. S. 330, the Court invalidated a statute annulling a gold-clause obligation which had been inserted in United States bonds, under express congressional authorization, deliberately to guard against the very contingency of depreciated payment which the later gold-clause legislation of 1933 would have required. Although this renunciation by Congress of an obligation which had been expressly assumed by it, and which was quite clearly relied upon by bond purchasers, might have been struck down on due process grounds, this Court did not reach that question. Rather the statute was declared invalid as contravening Art. 1, Sec. 8, cl. 2, which authorizes Congress "To borrow Money on the credit of the United States."

219, 236) toward persons whose mortgages were insured by the Administration prior to the 1954 Act. Despite the fact that Congress believed that Section 608 at all times prohibited transient rentals, Congress did not attempt, in any way, to impose liabilities on mortgagors who, like appellee, had rented their apartments to temporary occupants. Instead, in order to bring an end to the unintended competition between Section 608 housing projects, built with the aid of 90 per cent federal mortgage insurance, and hotels, financed without federal assistance, Congress simply forbade the practice in the future. And for those few mortgagors who, prior to 1954, had applied for and received permission to rent to transients, Congress carved out an exception to the prohibition in order to preserve a privilege which the Administration (perhaps erroneously) had purported to grant. Surely the concept of due process did not require Congress to extend this exception to appellee which had never applied for permission to rent to transients. Indeed, appellee neither sought nor obtained permission before charging tenants additional amounts for furnished apartments beyond the schedule-approved rents. Cf. *Woods* v. *Stone*, 333 U. S. 472.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed, and the cause remanded to the district court with instructions to dismiss appellee's complaint and to grant to the

Federal Housing Administration the relief sought in its cross-complaint.

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AUGUST 1958.

APPENDIX A

STATUTES INVOLVED

1. Section 608 of the National Housing Act, 56 Stat. 303, as amended, 12 U. S. C. 1743, provides in pertinent part:

> SEC. 608. (a) In addition to mortgages insured under section 603 of this title, the Commissioner is authorized to insure mortgages as defined in section 601 of this title (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided.
>
> (b) To be eligible for insurance under this section a mortgage shall meet the following conditions:
>
> (1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation. Such stock or interest shall be paid for out of the War Housing Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Commissioner under the insurance.
>
> (2) Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families, and for hardship cases as defined by the Commissioner, shall be provided under such

regulations and procedures as may be prescribed by the Commissioner.

* * * * *

2. Section 513 of the National Housing Act, added by Section 132 of the Housing Act of 1954, 68 Stat. 610, 12 U. S. C. (Supp. V) 1731b, provides:

SEC. 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

(c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure

issued prior to the effective date of the Housing Act of 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) no mortgage with respect to multifamily housing shall be insured for an additional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes, and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section by all appropriate means at his disposal, as to all existing multifamily housing with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided,* That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

(e) As used in this section, (1) the term "rental for transient or hotel purposes" shall have such meaning as prescribed by the Commissioner but rental for any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term "multifamily housing" shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon

which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corporation or trust of the character described in paragraph numbered (1) of subsection (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3) (B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (d) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices con-

stituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices, constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section.

APPENDIX B

Regulations Involved

24 C. F. R. 280, pertaining to "Multifamily War Housing Insurance; Eligibility Requirements of Mortgage Covering Multifamily Rental Housing", provides in pertinent part:

> § 280.11 *Amount of principal obligation.* The mortgage must secure a principal obligation in multiples of one hundred dollars ($100) but not exceed five million dollars ($5,000,000) and not in excess of ninety percent (90%) of the amount which the Commissioner estimates will be the necessary current cost of the completed property or project, including the land; the proposed physical improvements; utilities within the boundaries of the property or project; architects' fees; taxes and interest accruing during construction; and other miscellaneous charges incidental to construction and approved by the Commissioner: *Provided,* That the principal obligation of the mortgage shall not in any event exceed ninety percent (90%) of the Commissioner's estimate of the replacement cost of the property or project on the basis of the costs prevailing on December 31, 1947, for properties or projects of comparable quality in the locality: *And provided further,* That such mortgage shall not in any event exceed the amount which the Commissioner estimates will be the cost of the completed physical improvements on the property or project, exclusive of off-site public utilities and streets, and organization and legal expenses. Such part of the mortgage as may be attributable to dwelling use shall not exceed $8,100 per family unit.
>
> * * * * *

§ 280.24 *Occupancy priority to veterans; no discrimination against children.* The mortgagor must establish, in a manner satisfactory to the Commissioner, that after completion of the project, preference or priority of opportunity to occupy will be given to veterans of World War II and their immediate families, except that this requirement does not apply to hardship cases as defined by the Commissioner and approved by him. The mortgagor must certify under oath that in selecting tenants for the property covered by the mortgage the mortgagor will not discriminate against any family by reason of the fact that there are children in the family, and that the mortgagor will not sell the property while the mortgage insurance is in effect unless the purchaser also so certifies, such certifications to be filed with the Commissioner. (The act provides that violation of any such certification shall be a misdemeanor punishable by a fine of not to exceed $500.)

* * * * *

§ 280.26 *Requirements regarding form of mortgagor.* In addition to meeting the requirements set forth in §§ 280.23 to 280.25, inclusive, the mortgagor must be:

(a) A corporation or trust formed or created, with the approval of the Commissioner, for the purpose of providing housing for rent or sale, and possessing powers necessary therefor and incidental thereto, which corporation, or trust, until the termination of all obligations of the Commissioner under such insurance, is regulated or restricted by the Commissioner as to rents or sales, charges, capital structures, and methods of operation to such an extent as may be deemed advisable by the Commissioner. Such regulation or restriction shall remain in effect until such time as the mortgage insurance contract terminates without obligation upon the Commissioner to

issue debentures as a result of such termination. So long as such contract of insurance is in effect, the corporation or trust shall engage in no business other than the construction and operation of a rental housing project or projects; or

(b) A Federal or State instrumentality, a municipal corporate instrumentality of one or more States, or a limited dividend corporation formed under and restricted by Federal or State housing laws as to rents, charges, and methods of operation; or

(c) If the mortgage is not in excess of $200,000, the mortgagor may be an individual.

* * * * *

§ 280.29 *Regulation of mortgagor by Commissioner in general.* A corporate mortgagor shall be regulated through the ownership by the Commissioner of certain shares of special stock (or other evidence of beneficial interest in the mortgagor) which stock or interest will acquire majority voting rights in the event of default under the mortgage or violation of provisions of the charter of the mortgagor or the violation of any valid agreement entered into between the mortgagor, the mortgagee and/or the Commissioner, but only for a period co-extensive with the duration of such default or violation. The shares of stock or beneficial interest issued to the Commissioner, his nominee or nominees and/or the Federal Housing Administration shall be in sufficient amount to constitute under the laws of the particular State a valid special class of stock or interest and shall be issued in consideration of the payment by the Commissioner of not exceeding in the aggregate $100. Such stock shall be represented by certificates issued in the name of the Commissioner, and/or in the name of his nominee or nominees, and/or in the name of the Federal Housing Administration, as the Commissioner shall require. Upon the termination of all obli-

gations of the Commissioner under his contract of mortgage insurance or any succeeding contract or agreement covering the mortgage obligation, including the obligation upon the Commissioner to issue debentures as a result of such termination, all regulation and restriction of the mortgagor shall cease. When the right of the Commissioner to regulate or restrict the mortgagor shall so terminate, the shares of special stock or other evidence of beneficial interest shall be surrendered by the Commissioner upon reimbursement of his payments therefor plus accrued dividends, if any, thereon. Such regulation and the additional regulation or restriction provided in §§ 280.30 to 280.32, inclusive, shall be made effective by incorporation of appropriate provisions therefor in the charter or other instrument under which the mortgagor is created, or by agreement. In all cases where the insured mortgage is in excess of $200,000, the mortgagor must be a corporation or trust. In the case of an individual mortgagor, regulation by the Commissioner may be exercised through a regulatory agreement in form and content satisfactory to the Commissioner.

§ 280.30 *Required supervision of mortgagor.* The following are the items which will be regulated or restricted in the manner and to the extent hereinbefore indicated:

(a) No charge shall be made by the mortgagor for the accommodations offered by the project in excess of a rental schedule to be filed with the Commissioner and approved by him or his duly constituted representative prior to the opening of the project for rental, which schedule shall be based upon a maximum average rental fixed prior to the insurance of the mortgage, and shall not thereafter be changed except upon application of the mortgagor to, and the written approval of the change by, the Commissioner.

(b) The established maximum rental shall be the maximum authorized charge against any tenant for the accommodations offered and shall include all services except telephone, gas, electric, and refrigeration facilities. Charges permitted in addition to such maximum rental shall be subject to the approval of the Commissioner.

* * * * *

(f) The mortgagor shall furnish at the request of the Commissioner, his employees or attorneys, specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation, condition of the property and the status of the insured mortgage and any other information with respect to the mortgagor or its property which may reasonably be required. The above enumeration of specific items shall not be deemed in any manner to limit the generality of the preceding sentence. In case the mortgagor is in default under the insured mortgage, its regulatory agreement or charter, or has failed to meet any of the applicable requirements of this section or is in default with respect to any agreement between the mortgagor and the mortgagee or under any contract for the improvement of the mortgaged premises or under any agreement to which the Federal Housing Commissioner is a party, or in case an inspection shows that the property is not being managed or maintained in a manner satisfactory to the Commissioner, the Commissioner may require the mortgagor to furnish at the expense of the latter a complete audit of its books of account duly certified by a public accountant satisfactory to the Commissioner.

* * * * *

§ 280.34 *Development of property.* At the time the mortgage is insured the mortgagor shall have constructed and completed or shall be obligated to construct and complete new housing accommodations on the mortgaged

property designed principally for residential use, conforming to standards satisfactory to the Commissioner, and consisting of not less than eight (8) rentable dwelling units on one site and may be detached, semidetached, or row houses, or multifamily structures.

* * * * * *

§ 280.41 *Effective date.* This part is effective as to all mortgages on which a commitment to insure under section 608 is issued, on or after December 19, 1947, pursuant to an application for mortgage insurance filed on or after said date.

APPENDIX C

Plaintiff's Exhibit Number 31, *Planning Rental Housing Projects* (Federal Housing Administration; Revised, September 1947):

[p. 2] Forword. The purpose of this book is to demonstrate for prospective applicants for mortgage insurance under the provisions of Section 207 of the National Housing Act and Section 608 of the revision to that Act, what, in the opinion of the Federal Housing Administration, are the desirable principles to be observed in the planning of the building or buildings of a rental project, and of its site. * * *

[p. 5] Before discussing the physical characteristics which are deemed desirable in rental housing projects and the planning methods by which they may be achieved, a word is in order as to the types of rental projects contemplated by the National Housing Act and preferred by the Federal Housing Administration.

The Administration interprets the word "housing" to mean dwelling quarters for families—quarters which offer complete facilities for family life. A large variety of project types is possible: groups of single-family dwellings, row or group houses, row flats, walk-up apartments, and elevator apartments. Depending upon circumstances, any of these may occur not far from business districts of a city, or in less densely populated areas, or in its suburban sections.

Projects are preferred that have the following qualities:

1. Location in a distinctly residential area, which promises to retain good character.

2. A type of living unit that will appeal to a long-term rather than a temporary occupant.

3. Income from dwellings adequate to assure the financial success of the project, with income from the rental of garages, stores, and other facilities only a minor factor.

4. Tenants whose prospective income and ability to pay rent is not largely or solely dependent on the success and continuity of a single industry in the community.

[p. 6] Rental housing projects in distinctly commercial areas, hotels, apartment hotels, dormitories, club buildings partly devoted to residential use, farm dwellings, or "company housing" or other housing dependent on a single industry, are not considered acceptable, as they lack these characteristics.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

versus

THE DARLINGTON, INC.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

MOTION TO DISMISS

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DECEMBER 27, 1957.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 628

FEDERAL HOUSING ADMINISTRATION,

Appellant,

versus

THE DARLINGTON, INC.,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

MOTION TO DISMISS

Pursuant to Rule 16 of this Court the Appellee moves the Court to dismiss the appeal herein on the ground:

That the decision of the three judge district court did not declare Section 513 of the Housing Act of 1954 (68 Stat. 610) unconstitutional, and that therefore no direct appeal will lie to this Court as provided by 28 U.S.C. 1252.

Jurisdiction

This is a direct appeal from the decision of a three judge district court, and while the Jurisdictional Statement cites as authority for the direct appeal to this Court 28 U.S.C.

1253, a reference to that statute will show that direct appeals to this Court are limited to actions required by an Act of Congress specifically to be heard by a three judge court. Such is not the case here. The prior decision in this case by this Court (352 U.S. 977) will show that this Court sent the case back to be heard by a three judge district court on the grounds that this Court then considered a single district judge had declared an Act of Congress unconstitutional. If this Court has jurisdiction of this appeal it will have to come from a finding by this Court that the lower court has declared an Act of Congress unconstitutional, to-wit: Section 513 of the National Housing Act as amended (68 Stat. 610) 12 U.S.C. (Supp. IV) 1731.

Statutes Involved

The pertinent statutes, *viz.*, Sections 608 and 513 of the National Housing Act, as amended (56 Stat. 303, 12 U.S.C. 1743, and 68 Stat. 610, 12 U.S.C. (Supp. IV) 1731b), are set forth in Appendix D of the Jurisdictional Statement, pp. 54-59.

Questions Presented

Does the Federal Housing Administration have any right to prohibit the rental for less than thirty days of vacant apartments in a building over which it has insured a mortgage prior to the Housing Act of 1954, when there is no demand for the said apartments by (a) veterans of World War II; (b) immediate families of veterans of World War II—the classes that the Housing Act required be given preference of occupancy?

Reference to Section 608 of the National Housing Act prior to the enactment of Section 513 of the Housing Act of 1954 will show that there were no specific requirements

of the act nor were there any rules and regulations or any contract documents that would have prohibited the owner of an apartment project, the mortgage over which was insured by the Federal Housing Administration, from renting apartments in the project for less than thirty days. This has been admitted by the Appellants, which admission was incorporated as a part of the decision of the court. This will be shown by reference to page 32 of the Jurisdictional Statement wherein it is set forth:

> "It is conceded by F.H.A. that, as of December 30, 1949, no specific provision of the charter, by-laws, mortgage, mortgage note, or any rule or regulation of F.H.A., restricted the right of plaintiff to lease apartments in its project for periods of less than thirty (30) days. In fact, the only period of limitation appears in the charter where it is said:
>
> " 'Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders.'
>
> "It is significant that F.H.A. saw fit to impose a maximum rental period but overlooked what is now the partial subject of this controversy."

The Appellant did not attempt to prohibit rentals in the Appellee's apartment project for less than thirty days until after the passage of the Housing Act of 1954. We respectfully submit there is but one question presented in this appeal:

> Whether the wording of the Housing Act of 1954 is such as to apply the prohibition of the act to projects insured prior to the effective date of the said 1954 Act.

Any attempt on the part of the Appellant to claim that the Appellee under the terms of the acts, or rules and regulations of the Federal Housing Administration, or the contract documents in existence at the time the Appellant insured the mortgage over the Appellee's project, to-wit: December 30, 1950, was prohibited from renting apartments for less than thirty days, as the Court stated below, comes as an afterthought and is without any foundation whatsoever and we quote from the opinion of the court below (Page 44 of the Jurisdictional Statement):

> "In truth and in fact, the question now under consideration was never given a thought. In the desire of Congress to fulfill the need for housing, only such matters as the needs of war workers, veterans, families of veterans, and the customary soundness of the transaction from a financial standpoint with its attendant restrictions were the subject of legislation and intention."

Statement

Following World War II there developed the greatest housing crisis this nation has ever known. To meet the crisis Congress created Section 608, Title VI of the National Housing Act, the Veterans Emergency Rental Housing Act of 1946, emergency legislation intended to furnish rental housing for the returning veterans of World War II, or as stated in the caption of the Act:

> "To expedite the availability of housing for veterans of World War II by expediting the production and allocation of materials for housing purposes and by curbing excessive pricing of new housing, and for other purposes." (Public Law 388—79th Congress);

> "* * * assist in relieving the acute shortage of housing which now exists and to increase the supply of housing accommodations available to veterans of World War II at prices within their reasonable ability to pay * * *";

And provided:

> "Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immmediate families * * * shall be provided under such regulations and procedures as may be prescribed by the Administrator."

Under the provisions of the Veterans Emergency Rental Housing Act, the Federal Housing Administration on December 30, 1949, insured the mortgage over a twelve-story apartment building that had been constructed by the Appellee Darlington, Inc. under the terms and provisions of the Veterans Emergency Rental Housing Act. Upon the completion of the building the demand for apartments in the building by veterans of World War II or their immediate families or others for thirty days or more was not sufficient to provide the funds necessary to make the monthly payments called for by the insured mortgage.

The Darlington, Inc., in an effort to secure the funds necessary to make the payments called for by the mortgage, adopted the policy of renting apartments in its building for less than thirty days. Although the Federal Housing Administration was well acquainted with and apprised of this fact for many years prior to 1954, no effort was made to prohibit The Darlington, Inc. from renting the apartments for less than thirty days until after the passage of the 1954 Act. We refer to the opinion of the court below:

> "The subject (rental of apartments for less than thirty days) was thereafter brought to life by a letter of

F.H.A. to plaintiff dated January 4, 1955, which did not make reference to the Housing Act of 1954. In reply, Darlington made a fair disclosure of its operations as to furnished apartments and inquired as to what provisions of law or charter prohibited the renting of apartments for a period of less than thirty (30) days. Plaintiff's letter was referred to defendant's Deputy Assistant Commissioner who, in turn, then directed plaintiff's attention to the Housing Act of 1954. The present action followed this exchange of correspondence."

Upon the Appellant's threat to have the attorney general of the United States, under the provision of Paragraph (g) of the 1954 Act, prosecute The Darlington, Inc. unless it ceased the rental of apartments in its building for less than thirty days, this action was filed by Darlington, Inc. in the District Court for the Eastern District of South Carolina, asking the court to declare that The Darlington, Inc. had the right to rent apartments in its building for less than thirty days as long as there was no demand for the same by (a) veterans of World War II; (b) immediate families of veterans of World War II; (c) or others, for more than thirty days.

This case has had quite a history. District Judge Hoffman, before whom the matter was originally brought, felt that a decision in the case might possibly require a hearing by a three judge statutory court on the question of constitutionality of Section 513 of the Housing Act of 1954. Upon notification by Judge Hoffman, Chief Judge Parker of the Fourth Circuit Court of Appeals convened such a court and called for the submission of briefs by the parties. Upon reconsideration, the three judge court was dissolved and the case ordered heard by Judge Hoffman alone. After hearing the case in full, Judge Hoffman

(*The Darlington, Inc.* v. *Federal Housing Administration*, 142 F. Supp. 341) among other things, held that The Darlington, Inc., had a right to rent a reasonable number of its apartments for periods of less than thirty days "as long as priorities were maintained for the persons entitled thereto (veterans of World War II and their immediate families), and no proper person desiring occupancy for a period of thirty days or more is thereby precluded from obtaining accommodations." (Appendix B, p. 49, Jurisdictional Statement).

A direct appeal was taken from such judgment to this court under the authority of 28 U.S.C. 1252 on the ground that a single district judge had declared an Act of Congress unconstitutional. In a memorandum decision (*Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977) this court noted probable jurisdiction and remanded the case for consideration by a three judge district court. Accordingly, a new three judge district court was convened and upon consideration of the entire record, together with briefs and argument, the three judge court adopted as a part of its decision by reference the prior decision of Judge Hoffman and held that The Darlington, Inc. had the right to rent a reasonable number of its apartments for terms of less than thirty days and that the Federal Housing Administration had no right to prohibit such rental provided that no veteran of World War II, his immediate family or any other proper person be thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more. Thereupon Appellant brought this direct appeal from such decision.

In the history of this Court, no doubt many absurd and ridiculous propositions have been brought before, it, but we respectfully submit that in this appeal, presenting as it does an attempt on the part of the Federal Housing Ad-

ministration to prevent a mortgagor from renting vacant apartments to secure funds with which to pay the mortgage insured by the Federal Housing Administration, the Court has before it a situation where a government agency is willfully trying to force a company into insolvency with the inevitable result that such government agency will have to pay out the taxpayers' money in the form of mortgage insurance, the apartment project will have to be sold, at a loss to the government and to its owner, with the possibility that such project might be purchased and operated as an out-and-out hotel, the very thing that the Hotel Association sought to prevent by the enactment of Section 513 of the Housing Act of 1954. Should Appellant prevail, everyone will lose, including Appellee, Appellant and the Hotel Association, and common sense and justice will be relegated to a mockery.

In the words of Judge Hoffman (Appendix B, Jurisdictional Statement, pages 40 and 41):

> "The unusual situation created by reason of F.H.A.'s insistence to cease the practice of renting apartments for periods of less than thirty (30) days will admittedly necessitate the financial downfall of Darlington, with the resultant loss of an initial investment, together with the monthly payments of $6,222.79 each, beginning June 1, 1951, as well as a reserve account, etc. It certainly would not justify the continued existence of Darlington and bankruptcy would be the ultimate answer. A foreclosure of the mortgage would follow with the Commisionser of the F.H.A. acquiring title as it is a fair assumption that no purchaser at said sale would bid an amount equal to, or in excess of, the unpaid balance due on said mortgage. The mortgagee is obligated to acquire title under such circumstances and assign that title to the Commissioner who, in turn,

sells the property without regard to any limitations as to use, etc., unless, of course, F.H.A. insures a new mortgage on the project. The result is that a foreclosure is likely to bring about a hotel with its right to advertise and operate as such—the mortgagor would lose its investment—F.H.A. would undoubtedly be called upon to pay a substantial sum by reason of its insurance obligation to the mortgagee—and no one would profit."

Argument

At this point in this Motion we would like to invite the Court's attention to the statement of the lower court in its decision wherein it stated:

"This is not a matter involving so-called windfall profits which became so prevalent under loose and questionable practices in the years following the termination of World War II. Plaintiff's sponsors caused land, valued at $125,000.00, to become a part of the project. It has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11. F.H.A. insured a mortgage to the extent of $1,357,700.00 thus leaving an investment of $318,220.11 on the part of the plaintiff."

At the outset we recognize that this Court by implication at least in its prior Memorandum Decision noting probable jurisdiction (*Federal Housing Administration v. Darlington*, 352 U.S. 977), took the view that the district judge had held an Act of Congress (Housing Act of 1954) repugnant to the Constitution, and therefore since the three judge court adopted the single judge's opinion, it could possibly be argued that the issue of whether the lower court has

declared the 1954 Act unconstitutional has already been determined by this Court.

We submit, however, that a careful reading of the original opinion by the single district judge, and the decision of the three judge district court, shows that the court below has not declared that the wording of the 1954 Act applied to projects insured before the effective date of said Act. We submit that the court below simply construed the Act and held that to attempt to apply the 1954 Act retroactively so as to prevent the rental of apartments in The Darlington, Inc.'s project for less than thirty days would be an unconstitutional application of the Act. We invite attention to the wording of the decisions of the court below:

> "We find no fault with the right of Congress to provide such limitations as to projects not committed at the time of the passage of the Act of 1954, or the power of the Commissioner under Section 513(c) of the Act of 1954 to impose such restrictions as a condition of a grant of an extension of the term of the insurance. *We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation.*" (Opinion of three judge court, Appendix A, Jurisdictional Statement page 24.) (Emphasis added.)

We submit that a careful reading of the 1954 Act will show that Congress recognized that the act could not legally apply retroactively to projects over which the mortgage was insured or committed to be insured prior to the effective date of the Act.

At first glance Section 513 might convey the impression that all of its provisions are to apply to all mortgages insured under the National Housing Act, whether prior to or subsequent to the effective date of the Housing Act of

1954. A further reading of Section 513 (the full text of which is shown in Appendix D to Appellant's Jurisdictional Statement, pp. 55-59) indicates that the drafters recognized that any attempt to apply the provisions of Section 513 to mortgages insured prior to its enactment so as to affect the vested rights of mortgagors would be unconstitutional, and that the drafters of the Act limited the Commissioner under the terms thereof to the use of only "appropriate means" (see Paragraph "d") in carrying out the intent of Congress as expressed in the Act. The wording of the Act contains no command that the Commissioner shall apply the provisions of Paragraphs (f) and (g) of Section 513 as against mortgages insured prior to the effective date of the Housing Act of 1954.

The enactment clause of the Housing Act of 1954 states that "*this Act* may be cited as the Housing Act of 1954". (Emphasis added.). Section 513 (a) states that it has been the intent of Congress "since the enactment of the National Housing Act that housing built with the aid of mortgages insured under *that Act* is to be used *principally* for residential use; and that this intent excluded the use of such housing *for transient or hotel purposes*, etc. (emphasis added). Please note the reference to the National Housing Act as "*that Act*" and to the Housing Act of 1954 as "*this Act*".

Section 513 (b) provides that "no new, existing, or rehabilitated multi-family housing with respect to which a mortgage is insured under *this Act* shall be *operated for transient or hotel purposes* * * *". It is to be noted that the reference here is to mortgages insured under "*this Act*", to-wit: The Housing Act of 1954. The prohibition is against *operation for transient or hotel purposes*, not the mere renting of a few apartments for less than thirty days.

Section 513 (c) provides that no such mortgage shall be insured under "this Act" (the housing Act of 1954) ("ex-

cept pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954") unless the mortgagor agrees not to rent "such housing or any part thereof for transient or hotel purposes".

The exception of commitments issued prior to the effective date of the Housing Act of 1954 significantly indicates the intention to exclude not only projects the mortgages upon which were insured prior to enactment of the 1954 Act, but also those upon which mere commitments to insure had been issued prior to such date.

And Section 513 (d) provides in enforcing the expressed Congressional intention, the Commissioner is limited to the use of "appropriate means at his disposal". There is no direction in subsections (d), (f), (g), or (h) to apply the punitive provisions of subsections (f) and (j) to projects the mortgages upon which were insured prior to enactment of the Housing Act of 1954, but such sections specifically apply to mortgages insured after such date. As we analyze Section 513 of the Housing Act of 1954, there is nothing in the wording of the Act itself that gives the Act a retrospective application so as to affect or impair *prior vested rights*. The Act is simply declaratory of the intent of Congress and should be given retrospective operation as to such intent if in doing so, vested rights will not be impaired.

We believe, therefore, that it is clear from the wording of the Act and from its legislative history, that Congress did not intend the 1954 Act to operate retroactively so as to disturb rights that had become vested. Congress did intend to prohibit the use for *transient or hotel purposes* of projects to be insured in the future, and also to have the Commissioner prevent such use by projects insured in the past *where he could legally do so without destroying vested rights*. The legal presumptions are against reading a retroactive intent into a statute.

Moreover Appellee maintains that a careful reading of the decisions below (Appendix A and B Jurisdictional Statement) discloses that nowhere in either of said decisions of the District Court was Section 513 of the Housing Act of 1954 declared unconstitutional. After carefully considering the provisions of said Section 513, the District Court simply stated that the Housing Act of 1954 could not "be given a retroactive effect to previously committed projects except to the extent within the reach of the reserve power of regulation". (Appendix A Jurisdictional Statement page 24.) And the Court stated that an absolute prohibition as here applied against rentals for less than thirty days was not within such reserve power of regulation (Appendix A Jurisdictional Statement page 23).

Appellee respectfully submits that a careful reading of the decisions of the District Court will show that such decisions were based on contract provisions, statutes and rules and regulations in effect at the time Appellant insured the mortgage upon Appellee's project, to-wit: December 30, 1949.

In our view the decision of the lower court was to the effect that Section 513 of the Housing Act of 1954 was a proper and constitutional exercise of the right of Congress to declare its own intent but that such section does not apply to previously committed projects.

> "We find no fault with the right of Congress to provide such limitations as to projects not committed at the time of the passage of the Act of 1954, or the power of the Commissioner under Section 513 (c) of the Act of 1954 to impose such restrictions as a condition of a grant of an extension of the term of the insurance. *We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the re-*

served power of regulation." (Opinion of three judge court Appendix A Jurisdictional Statement page 24.) (Emphasis added.)

As was stated by this Court in the case of *Crowell* v. *Benson*, 285 U.S. 22:

> "When the validity of an Act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. * * *"

We respectfully submit that the court below has in its decision adopted a construction of Section 513 of the Housing Act of 1954 which fairly avoids a declaration of unconstitutionality.

Conclusion

The attorneys for The Darlington, Inc., the Appellee herein, submit that this Court is without authority to hear this direct appeal from a three judge district court, in that the said three judge district court, in its opinion, merely construed the applicability of the Act in question, in reference to the facts presented in the case in which construction of the Act the Court merely held, and we quote from its decision:

> "We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation." (page 24 Jurisdictional Statement.)

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December 27, 1957.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

v.

THE DARLINGTON, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF FOR THE APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

v.

THE DARLINGTON, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

BRIEF FOR THE APPELLEE

Questions Presented

The issue in this case is simply whether the Appellant, Federal Housing Administration, upon complaint by a hotel, may use the prohibitive terms of Section 513 of the Housing Act of 1954, prepared, introduced and passed by Congress at the direct persuasion of the American Hotel Association, to prevent competition with the members of

that Association, to deprive the Appellee of its right to rent for terms of less than thirty days, a mere ten per cent or less of the otherwise unrentable apartments in its twelve story apartment building in Charleston, S. C., consisting of 156 apartments, the mortgage over which was insured by the Appellant under the 1946 Housing Act known as the Veterans Emergency Housing Act, when Appellee does not advertise or hold out to the public in any manner whatsoever that transient accommodations are available in the building, does not furnish bell boy service or room service, and has no dining rooms, convention rooms or other similar space usually found in a hotel, and when it is uncontradicted that without the rent from such apartments the Appellee would be unable to make the payments called for by the mortgage insured by the Appellant, and the Appellee would be faced with certain bankruptcy, the Appellant would have to foreclose on the mortgage, suffer a substantial loss on its insurance contract, with resulting loss to the taxpayers of the United States, and with the prospect that when Appellant disposed of the building it would be turned into a hotel subsidized by the taxpayers to the extent of the amount which Appellant will have lost on the sale (R. 114).

There are in Appellee's opinion four principal questions presented by this appeal. We feel a fair statement of such questions is as follows:

First Question

Was there any provision in Section 608 of the National Housing Act, as amended by the Veterans Emergency Housing Act of 1946, or in any regulation issued thereunder in existence when Appellant insured the mortgage over Appellee's apartment project, or in the Appellee's charter, prohibiting the rental of an apartment unit in Appellee's project for a term of less than thirty days?

Second Question

Does Section 513 of the Housing Act of 1954 have such retroactive effect in law as to empower the Federal Housing Administration to deprive the Appellee of its right to rent less than a mere ten per cent of the apartments in its building for a period of less than thirty days?

Third Question

Does Section 513 of the Housing Act of 1954 except from its provisions such projects as Appellee's, operated as it is, which were insured by the Appellant prior to the effective date of the said Act?

Fourth Question

Does Section 513 of the Housing Act of 1954 serve any valid public purpose?

Statement

The issue in this case is not whether the Appellee has a right to operate its building as a hotel, as Appellant alleges in its Brief, but whether the Federal Housing Administration, an agency of the government created for the purpose of insuring mortgage loans, can retroactively apply the prohibitive terms against transient rentals found in the new Housing Act of 1954[1] to deprive the owner of an apartment house (the mortgage over which was insured on December 30, 1949, many years prior thereto

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[1] When requested by the Appellee to advise by what authority the Appellant claimed the power to deprive the Appellee of its rights to rent some of its apartments in its building for less than thirty days, the Deputy Assistant Commissioner of the Appellant replied, "You may not have heretofore been made aware of a section of the Housing Act of 1954 which prohibits the use of such government assisted projects for transient purposes. We are, therefore, quoting a portion of the new law". (Exhibit "C" to Amended Complaint; R. 19).

under the terms of the Veterans Emergency Housing Act of 1946); of its right (R. 113) to rent for periods of less than thirty days a mere ten per cent or less of the apartments in its building (R. 113)—or, as the Three-Judge Court stated:

> "All that is involved here is the right of the mortgagor (Appellee) to lease apartments, *otherwise unrentable*, for periods of less than 30 days." (R. 129; emphasis added.)

A reading of the Veterans Emergency Housing Act of 1946 (Section 608 National Housing Act) under which the Appellee's note and mortgage were insured, will show that it contained no provision whatsoever prohibiting the rental of apartments in projects insured under such act for less than thirty days, as stated by the Court below, the Appellant concedes and admits (R. 107):

> "It is conceded by F. H. A. that, as of December 30, 1949 no specific provision of the charter, by-laws, mortgage, mortgage note, or any rule or regulation of F. H. A. restricted the right of plaintiff to lease apartments in its project for periods of less than thirty (30) days."

The Appellant declares, however, that regardless of the fact that the law, the rules and regulations, by-laws, mortgage, mortgage note and charter provisions did not contain any specific prohibition against rentals in the Appellee's project for less than thirty days, that it is the history of the Act which prohibits transient rentals in the Appellee's project.[2]

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[2] In answer to the Court's inquiry as to whether there was any prohibition in the Act against transient rentals, Mr. Eardley, Trial Counsel for the Appellant, stated, "There was no language that said, 'You cannot rent to transients', if that is what you mean. I think the history of the Act makes it just as expressly clear." (R. 101)

It is not contested that without the revenue from the rental of the apartments in the Appellee's building for less than thirty days, the Appellee will lose its investment in the building, running into hundreds of thousands of dollars, and the Appellee will not be able to make the payments called for on the mortgage, and will be faced with bankruptcy, or as the Court below stated (R. 102-103):

> "This is not a matter involving so-called windfall profits which became so prevalent under loose and questionable practices in the years following the termination of World War II. Plaintiff's sponsors caused land, valued at $125,000.00 to become a part of the project. It has been stated that the total cost of the building was $1,550,920.11 which, when added to the land value, makes a total project cost of $1,675,920.11. F.H.A. insured a mortgage to the extent of $1,357,700.00, thus leaving an investment of $318,220.11 on the part of plaintiff."

In addition to the initial investment of the sum of $318,220.11 in the construction costs in the building as above set forth, it is uncontested that at the time of the commencement of this action, the Appellee had made monthly payments called for by the mortgage totalling $305,957.25 (Amended Complaint; R. 5). And the Court below stated (R. 114):

> "The unusual situation created by reason of F.H.A.'s insistence to cease the practice of renting apartments for periods of less than thirty (30) days will admittedly necessitate the financial downfall of Darlington, with the resultant loss of an initial investment, together with the monthly payments of $6222.79 each, beginning June 1, 1951, as well as a reserve

account, etc. It certainly would not justify the continued existence of Darlington and bankruptcy would be the ultimate answer. A foreclosure of the mortgage would follow with the Commissioner of F.H.A. acquiring title as it is fair assumption that no purchaser at said sale would bid an amount equal to, or in excess of, the unpaid balance due on said mortgage. The mortgagee is obligated to acquire title under such circumstances and assign that title to the Commissioner who, in turn, sells the property without regard to any limitations as to use, etc., unless, of course, F.H.A. insures a new mortgage on the project. The result is that a foreclosure is likely to bring about a hotel with its right to advertise and operate as such—the mortgagor would lose its investment—F.H.A. would undoubtedly be called upon to pay a substantial sum by reason of its insurance obligation to the mortgagee—and no one would profit."

The Appellant contends that although it is the insurer of the mortgages, it is not concerned with whether the rental of some apartments in a project for less than thirty days is necessary in order for the owner of the rental project to meet the payment called for by the mortgage.[2] Reference to Section 10(f)2 of the Veterans Emergency Housing Act of 1946 (60 Stat. 214) will show that it amended Section 608(b) of the National Housing Act by striking out subsection (2) thereof, which had required that projects insured under former Section 608 be "designed for

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[2] "Mr. Long: Next is the affidavit of Mr. Steadman which shows the operating loss of the Darlington Apartments. * * *.

"Mr. Eardley: We object to the affidavit on the ground that even if the facts alleged in here are true, it wouldn't be material to the issues in this case, which is simply to determine whether or not under the law they are entitled to rent to transients. The law doesn't say that if you make a loss you are entitled to rent transients." (R. 46-47.)

rent for *residential* use * * *" (Emphasis added) and inserted in lieu thereof a new and essentially different subsection (2) which did not contain any provision that the projects insured thereunder had to be designed for residential use. Subsection (2) of the new Section 608 of the National Housing Act, under the terms of which the Appellee's project was insured, reads as follows (60 Stat. 214; 12 USC 1743 (b)(2)):

> "(2) Preference or priority of opportunity in the *occupancy* of the mortgaged property for veterans of World War II and their immediate families, and for hardship cases as defined by the Administrator, shall be provided under such regulations and procedures as may be prescribed by the Administrator." (Emphasis added.)

The record in this case is conclusive, and Appellant has conceded that "no person entitled to priority has ever been rejected, and no one desiring so-called 'permanent' occupancy of an apartment has been required to wait any time to obtain same." (R. 112).

A. Facts Underlying This Litigation

Following the passage of the Housing Act of 1954, by letter dated January 4, 1955, the Appellant, through its South Carolina State Director, demanded of the Appellee, The Darlington, Inc., that it cease immediately the offering and renting of accommodations in its apartment building on a transient basis (Exhibit "A" to Amended Complaint; R. 16-17). The said letter did not disclose any authority as the basis for such demands. The Appellee in reply, by letter dated January 10, 1955 (Exhibit "B" to Amended Complaint; R. 17-19) made a fair disclosure of its operations, admitting the rental of some of its apartments for

less than thirty days, and in the said letter stated and requested as follows:

> "• • • it is the desire of this company to cooperate with your Administration in every reasonable manner, and certainly we have no desire to avoid any responsibility that may be imposed upon our company by the charter of the corporation, and we are sure your administration does not desire to impose any restrictions on our company on the operation of the building that is not called for by the provisions of the charter." (R. 17.)
>
> • • • • • • •
>
> "We, therefore, would greatly appreciate if you would advise us what provisions of law or what provisions of our charter prohibits the renting of apartments for a period of less than thirty days." (R. 18.)

On January 18, 1955 (Exhibit "C" to Amended Complaint; R. 19-21) Mr. LeGrand W. Perce, Deputy Assistant Commissioner (a former Chief Counsel of its Rental Housing Division; Pl. Ex. 28; R. 44, 217), replying to the Appellee's letter of January 10, 1955, directed Appellee's attention exclusively to a new law, the Housing Act of 1954, with no suggestion whatsoever that rentals for periods of less than thirty days had ever been previously prohibited or even frowned upon. His exact language was as follows:

> "You may not have heretofore been made aware of a section of the Housing Act of 1954 which prohibits the use of such government assisted projects for transient purposes. We are, therefore, quoting a portion of the *new law.*" (R. 19; emphasis added.)

The Deputy Assistant Commissioner served notice in his letter that unless the Appellee immediately ceased rent-

ing apartments in its building for less than thirty days, the Appellant would request the Department of Justice to bring action against Appellee to stop such rentals.

B. Proceedings in the Court Below

Based upon the threat of the Appellant as set forth in the exchange of letters above referred to, the Appellee brought this action for a declaratory judgment in the Court below, simply praying judgment as follows (Amended Complaint; R. 15):

> "1. That the Court enter a Declaratory judgment construing and determining the relations and respective rights of the plaintiff and defendant.
>
> "2. That the Court determine that the plaintiff corporation has the right to rent available vacant units in its building to tenants for terms of less than thirty days so long as it complies with the terms of the Housing Act in existence at the time of its incorporation, construction of its said building and insurance of the mortgage on the building by the defendant, and maintains and keeps rental units available for occupancy by tenants for terms or more than thirty days and maintains and operates its building principally for residential use."

The Court below has twice ruled in favor of the Appellee's right to rent a reasonable number of apartments in its building for less than thirty days, 142 F. Supp. 341 (R. 101-121); 154 F. Supp. 411 (R. 127-130). Thic appeal is from the Order and Decree of the Three-Judge District Court of September 4, 1957, the first paragraph reading as follows (R. 130):

> "(1) That the plaintiff has the right to lease a reasonable number of apartments in its apartment building in

Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided that any veteran of World War II, his immediate family, or any other proper person desiring occupancy for a period of thirty days or more is not thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered."

C. Facts Not In Issue

Appellant has, in this litigation, consistently attempted to cast this case in the light of a controversy as to whether Appellee may operate its project as a hotel, and we feel that the record should be kept clear, that the Appellee does not and never has operated its apartment project as a hotel. In the unchallenged finding of the Court below, Appellee "does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients." (R. 113.)

This litigation does not involve in any manner or means a desire on the part of the Appellee to operate its project as a hotel, but merely to utilize available vacant and otherwise unrentable apartments in it for terms of less than thirty days, only as necessary to supplement its revenues and enable it to meet its mortgage payments. This is best evidenced by the relief prayed for in the Complaint heretofore referred to (R. 15, supra, 9).

The plans of the building (Plaintiff's Exhibit 5, R. 40) filed with this Court, will show that the building contains

no public rooms or similar facilities usually found in hotels. The record in this case will show that Appellee's building contains no single rooms such as are suitable for hotel operation, but contains apartment units of from two to six rooms each (Pl. Ex. 24-A; R. 43, 194).

The Court below found that the number of rentals for less than thirty days for Appellee's building was "approximately ten per centum of the entire available occupancy" (R. 113). It is thus obvious that this case does not involve the issue of Appellee operating a project insured under the Veterans Emergency Housing Act for hotel purposes, even in part, for as stated by the Court below, "But the mere acceptance of transients as tenants does not, in and of itself, convert a rental housing project into a hotel." (R. 113).

D. Historical Background Of The Veterans Emergency Housing Act

With the return to civilian life of millions of veterans of World War II, there developed the greatest housing shortage ever known to this country. The need was not for hundreds of thousands of living accommodations but for millions (100 Cong. Rec. 11879; Pl. Ex. 30; R. 44, 222). Congress was called upon to provide housing for the veterans. To meet the unprecedented situation Congress considered—but rejected—a mere amendment to the housing act. Instead, it enacted the temporary Veterans Emergency Housing Act of 1946 as independent legislation, wholly outside the framework of the National Housing Act, to provide temporary accommodations to meet the temporary emergency needs of the returning veterans. This is the Act which is before this Court for construction in this case.

The Report of the Senate Committee on Banking and Currency on the Veterans Emergency Housing Act of 1946

(S. Rept. 1130, 79th Cong., 2d Sess.) was submitted by Senator Barkley. That report stated (pp. 9, 10):

"TEMPORARY CHARACTER OF THE BILL

"The Committee fully recognizes that the unusual powers and provisions contained in the bill should not be of permanent duration. The emergency begets the need, and the need should disappear when the emergency is over." (p. 9) • • •.

"While the bill as passed by the House of Representatives amended the National Housing Act, the committee has felt it more appropriate that the bill be cast in the form of an independent Veterans' Emergency Housing Act of 1946, *since the features of the bill are temporary and bear little relationship to the National Housing Act which deals with certain permanent housing legislation.*" (p. 10; emphasis added.)

This statement is in sharp contrast with the repeated assertions in Appellant's Brief that Section 608 contemplated "permanent residential housing". As further evidence of the temporary character of the bill, the Appellant, the Federal Housing Administration, declared in January 1947 (Pl. Ex. 8; R. 41, 135, 147):

"The Veteran needs—and wants apartments." • • •

"Veterans are not prepared today to undertake home purchases for the majority cannot afford to build or buy on today's market. Most of them are young. Some are still in school and others are in job training and have not established themselves financially. Their ultimate earning levels are not yet determined. Furthermore many of them have not yet selected the community in which they will settle permanently."

The need was for temporary housing to serve the temporary need of the veterans, many of whom, according to the Appellant's witness, Mr. Prothro, were living in so-called chicken coops and doubling up with their in-laws (R. 100).

Senator Sparkman, speaking in 1954 of the need for the former Veterans Emergency Housing Act of 1946, stated (100 Cong. Rec. 11879; Pl. Ex. 30; R. 44, 222).

What made the postwar section 608 program necessary?

> "Let us take a look back in history. When the war ended there were millions of veterans searching for a place to live, any place that would enable them and their families to enjoy *decent shelter* while they went about the business of becoming again a normal part of the civilian community." (emphasis added.)

If there is any question that the Veterans Emergency Housing Act was intended to provide temporary rental housing for veterans during the housing crisis that followed World War II, rather than permanent family dwellings as asserted by the Appellant, we invite attention to the report of the Committee on Banking and Currency (S. Rept. 1130, 79th Cong., 2d Sess.) where the Committee, in reporting the bill to the United States Senate, stated:

> "• • • The committee calls special attention to the fact that this portion of the bill places emphasis upon rental housing. It is the specific intent of the committee that those in charge of the program shall make every reasonable effort to obtain a substantial volume of rental housing—*or in any event housing held for rental during the emergency*—through the operation of title VI, both with respect to multi-family units and individual units. While home ownership is to be encouraged, a large percentage of veterans do not yet possess the certainty

> of income *or of location*, or the financial means, to purchase homes at this time. The bill as approved by the House of Representatives included this attention to rental housing." (pp. 8-9; emphasis added.)

Any contention that the Veterans Emergency Housing Act was to provide permanent residential dwelling accommodations is simply not sustained by the facts, the need that brought the Act into existence, the legislative history of the Act, or the wording of the Act itself.

It will be noted by reference to all other provisions of the National Housing Act, that Section 608 as amended by the Veterans Emergency Housing Act of 1946 was at the time of its enactment the only act ever incorporated as a part of the National Housing Act, designated as an emergency housing measure.

It will be further noted by reference to the Veterans Emergency Housing Act, and all other provisions of the National Housing Act, that it was at the time of its enactment the only part of the National Housing Act that did not provide as a part of the wording of the statute itself that any project insured under the terms of the act should be designed principally for residential use. The Court below stated (R. 128):

> "When Congress passed the Housing Act of 1954 declaring its intent 'since the enactment of the National Housing Act' to the effect that housing built with the aid of mortgages insured under the former Act was to be used 'principally for residential use', it injected the last quoted words into the Act relating to '608 projects' for the first time. True, similar language had been used in related provisions of the National Housing Act, but the amplification of this 'intent' to exclude the use of such housing for transient or hotel purposes

while the insurance on the mortgage was outstanding makes its first appearance in the Act of 1954."

The Senate Committee Report in connection with the Veterans Emergency Housing Act of 1946 will show that Congress in the enactment of the Act, being desirous of meeting the housing crisis with all due speed, directed the Federal Housing Administration to use every effort to promote the necessary housing under the said Act. The Committee, in its report (S. Rept. 1130, 79th Cong. 2d Sess.) stated as follows:

"Paragraph (c) directs Government agencies to exercise their emergency and other powers to aid in the solution of problems created by the existing housing emergency." (p. 10)

The Veterans Emergency Housing Act of 1946, 60 Stat. 207, 208, reads as follows:

Sec. 1.(a) "The long-term housing shortage and the war have combined to create an unprecedented emergency shortage of housing, particularly for veterans of World War II and their families. * * *"

Sec. 2.(c) "The executive agencies of the Government shall exercise their emergency powers and other powers for the purpose of aiding in the solution of the problems created by the existing housing emergency, the alleviation of which is vital to an orderly transition from war to peace."

The President of the United States stated in December 1946 in reference to the Veterans Emergency Housing Program:

"I am determined that a vigorous housing program will continue to be carried out in 1947. * * *. The main

point of emphasis for 1947 is rental housing * * *. More family units must be made available for rent to veterans. They should not be compelled to buy in order to get shelter. * * * The great bulk of this task will fall upon private enterprise." (Pl. Ex. 8; R. 41, 135, 172; Pl. Ex. 9; R, 41, 178)

Pursuant to the mandate of the Veterans Emergency Housing Act, the Appellant exercised to the fullest its emergency and other powers in the solution of the housing emergency, putting into effect one of the greatest promotional campaigns that could possibly be conceived of, designed to induce private industry to engaged in the production of temporary rental units for veterans. Fifty pages of exhibits in this case (Pl. Ex. 8; R, 41, 134-177; Pl. Ex. 9; R, 41, 178-184) contain certified copies of some of the Appellant's voluminous promotional press releases, speeches prepared by the Washington office for the State Directors, instructions and directives, sales talks and programs for the meetings to be held throughout the country, all designed and intended to induce the builders of the country to engage in the construction of Veterans Emergency Rental Housing projects.

The Federal Housing Administration forwarded to the Chambers of Commerce and other appropriate groups in all cities in America with 5,000 population or more publicity material with requests that Appellant's State Directors be furnished with the names of builders and architects in the community (Pl. Ex. 8; R, 41, 140). In all cities in America having a population of 10,000 or more, Appellant's State Directors were instructed to arrange meetings with architects, builders, realtors and lenders, and representatives of the Washington office of the Federal Housing Administration were to appear at said meetings and

deliver addresses, all for the promotion of the construction of Veterans Emergency Rental Housing projects (Pl. Ex. 8; R, 41, 152).

Appellant represented that Veterans Emergency Rental Housing projects would give the mortgagors sound investments that would yield substantial returns (Pl. Ex. 8; R, 41, 147). Yet the Appellant recognized that the projects were being built to serve a particular temporary emergency and asserted that:

> "c. Action has been taken * * * * and provisions made for the *adjustment of mortgage terms*, where it is deemed necessary in order that rental projects, constructed under the present emergency, may continue to maintain their competitive market position". (Pl. Ex. 8; R, 41, 137-138; emphasis in original).

As further evidence that Appellant recognized that housing built under Section 608 was to serve a temporary need we quote from a letter of January 2, 1947, signed by Raymond M. Foley, Appellant's then Commissioner (Pl. Ex. 9; R. 41, 180):

> "*Adjustment of Section 608 Mortgage Terms*
>
> "So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the Federal Housing Administration will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necesary."

The President of the United States, in his public statement of December 14, 1946, expressed the same thought in these terms (Pl. Ex. 8; R, 41, 176):

"Assistance for Rental Projects"

• • •

"To guard against the possibility of lesser earnings of housing projects after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subsequent periods in the life of the project."

No where in the voluminous mass of its promotional material did the Appellant so much as intimate or suggest, directly or indirectly, that there was or would ever be any limitation on the minimum rental terms of apartments in such projects.

There can be no doubt that the Federal Housing Administration, pursuant to the mandate of the Veterans Emergency Housing Act, did an outstanding promotional job, promoting private industry to create the temporary rental housing needed by the returning veterans of World War II. We quote from an address by Senator Sparkman in 1954 (100 Cong. Rec. 11,882-11,883; Pl. Ex. 30; R. 44, 225):

"• • • The 608 program broke the back of the postwar rental housing shortage. It provided good rental housing quickly to meet the needs of our returning veterans. • • • It was undoubtedly one of the most successful of all Government housing programs. • • •

"Mr. President, these are matters of history—of indisputed, incontrovertible fact. Here we have a program designed to aid the veteran to get rental housing, • • • which provided the housing at a time when no other device could have succeeded, *and which did it without using 1 cent of Government money.*" (Emphasis added.)

Samuel E. Neel, General Counsel, Mortgage Bankers Association of America, in testifying before the Senate Committee in connection with the Housing Act of 1954, stated in connection with the 608 program as follows (Senate Hearings, Part 3, p. 1512; Pl. Ex. 28; R. 44, 208-209):

> "* * * At the time this program was enacted, Congress went out of its way to note that the country was desperately in need of rental housing. The program was intentionally made liberal in order to encourage builders to build these projects. With this congressional mandate the FHA undertook an intensive promotional campaign. * * *
> * * *.
>
> "* * * There is no question but that the FHA all over the United States encouraged builders to go into this program. They made sales talks. It was just like a bond rally. They were trying to get houses built and they were trying to get builders in the program."

Walter L. Green, Deputy Commissioner, retired, of the Federal Housing Administration, who was a former Commissioner of the Administration, when called before the Senate Committee on Banking and Currency to advise the Committee in 1954 in connection with its housing problem (R. 211) stated in reply to a question by the Committee Chairman in reference to the Veterans Emergency Housing Program (Senate Hearings Part 3, p. 1670; Pl. Ex. 28; R. 44, 212):

> "Senator, as a matter of record, there is no question but what we promoted it and promoted it hard, all over the country, in order to get builders to go into this operation."

There is no suggestion, reference or intimation to be found anywhere in the fifty pages of promotional material designed to induce the citizens of this country to construct Veterans Emergency Rental Housing projects set forth in the record of this case (Pl. Ex. 8; R. 41, 134-177; Pl. Ex. 9; R. 41, 178-184), that the Appellant ever intended that apartments in such projects could not be rented for less than thirty days. The facts surrounding the promotion of the construction of the Veterans Emergency Rental Housing projects, we submit, are repugnant to and contradict Appellant's present assertion that it has always been its intention that apartments in projects insured under the Veterans Emergency Housing Act could not be rented for less than thirty days.

It would be contrary to fair play and fair dealing and beneath the dignity of an agency of this Government for Appellant to have concealed from those whom it was promoting into the construction of Veteran Emergency Rental Housing projects that apartments in such projects could not be rented for less than thirty days, and that Appellant would attempt to enforce such prohibition in situations like those presented in the instant case, where enforcement will mean certain bankruptcy. We cannot but believe that if at the time the Appellant was promoting the Veterans Emergency Housing Program it had believed that apartments in such projects could not be rented for less than thirty days, Appellant would have so indicated to the American public somewhere in its voluminous promotional data and publications.

The Federal Housing Administration was seeking housing accommodations for veterans, whether for one day, one week, or for three years. As the Court below stated (R. 116):

"In truth and in fact, the question now under consideration was never given a thought. In the desire of Congress to fulfill the need for housing, only such matters as the needs of war workers, veterans, families of veterans, and the customary soundness of the transaction from a financial standpoint with its attendant restrictions were the subject of legislation and intention."

Summary of Argument

The issue in this case is simply whether the Appellant can retroactively apply the prohibitive terms and provisions against operations for hotel and transient purposes found in Section 513 of the Housing Act of 1954 so as to prohibit the Appellee, the owner of a 12-story 156-unit apartment building in Charleston, S. C., from renting a few of the apartments in the building for less than thirty days, when there was no prohibition to be found against such rentals under the terms of Section 608 of the National Housing Act, as amended by the Veterans Emergency Housing Act of 1946, under which the mortgage over the Appellee's project was insured on December 30, 1949.

This case, unlike the facts in the case of *Mason* v. *Rock Creek Plaza, Inc.*, (D.D.C. 1958) cited by the Appellant in its Brief at page 39, does not involve the issue of whether the Appellee may or may not operate its building as a hotel, which is substantially all that is prohibited by Section 513. And again unlike the facts in *Mason* v. *Rock Creek Plaza, Inc.*, this case does not involve repeated and continuous violation of a written agreement with the Federal Housing Administration. In that case the mortgagor through written contract with the Appellant, offered accommodations to 600 transient guests at a time. It advertised as a hotel, furnished room and bell boy services. In this case by

contrast during the month of the greatest demand for transient rentals in Charleston, Appellee has rented on an average less than 10% of its apartments for terms of less than thirty days (R. 113).

It is further undisputed that the Appellee has never advertised as a hotel, nor does it offer room and bell boy services, but simply has rented apartments for less than thirty days when there was no demand otherwise and rather than to leave the apartments vacant and unproductive of any revenue at all.

The Court below, as the Complaint will show, was simply asked to declare that the Appellee had the right to continue to rent available vacant units for periods of less than thirty days, when there was no demand for such apartments by veterans of World War II, who were entitled to priority of occupancy, or when there was no demand for the apartments by anyone for rentals of more than thirty days. The record shows that the rental of apartments for less than thirty days was a mere incidental activity of the Appellee in the operation of its building, trying to secure revenue with which to make the payments called for by the mortgage insured by the Appellant, and in an effort to protect the Appellee's investment in its building running into some four hundred thousand dollars.

We will not in our argument comment on the affidavit of Mr. Norman P. Mason, the present Commissioner of the Federal Housing Administration (R. 35) which the Appellant attempts to use (Appellant's Brief page 33 n. 34) as authority for its contention that the term "principally designed for residential use" as found in the Act excludes the rental of any apartments in any multifamily housing project for less than thirty days. The affidavit of Mr. Mason shows that his allegations are based upon information and belief, and rightly so, because as shown from the hearings before the Banking and Currency Committee of

the Senate in 1954 (Senate Hearings Part 1, p. 243; Pl. Ex. 27) Mr. Mason first appeared before the Committee in connection with the Housing Act of 1954 as a representative of the Chamber of Commerce being appointed Commissioner shortly thereafter.

Further, his affidavit refers to the interpretation placed on the words "principally designed for residential use" as found in the Act. There is no such wording in Section 608 of the Act. Further, we maintain and will show that the word "principally" can never be distorted into meaning "exclusively", as the Appellant urges.

The Appellee maintains:

First: That contrary to the implications set out in the Appellant's Brief, this case does not involve the issue of the Appellee attempting to operate its building for hotel purposes. As the lower Court stated, the Appellee does not advertise as a hotel, has no license as such, and no signs appear indicating its willingness to accept transients. As the plans of the building, which are in evidence, (Pl. Ex. 5) will show, the building has no public space such as dining, meeting or convention rooms, or the like, usually found in hotels, and no food, beverages, or bell-boy service is furnished to any tenant in the building.

Second: We take it to be admitted, it certainly is not contested, that all rights between the Appellee and the Appellant, whether involving transient rentals or otherwise, are to be determined as of the date the Appellee's note was endorsed for insurance by Appellant. The rule of the Appellant so states (24 CFR 282.19):

> "*Amendments to Regulations.* The regulations in this part may be amended by the Commissioner at any time and from time to time, in whole or in part, *but such amendment shall not affect the contract of insurance*

on any mortgage already insured or any mortgage or prospective mortgages on which the Commissioner has made a commitment to insure." (Emphasis added.)

The endorsement on the note secured by the mortgage over Appellee's project reads as follows (R. 106-107):

"Insured under section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949.

To the extent of advances approved by the Commissioner.

Federal Housing Commissioner
By H. E. Bailey
Authorized Agent

Date, December 30, 1949."

Third: The Appellant concedes that there was nothing in the wording of the law, the rules and regulations, or the Appellee's charter, or in any contract documents between the parties, as of the date the Appellee's mortgage was insured, that directly or specifically prohibited rentals of apartments in Appellee's project for less than thirty days.

Fourth: The Appellant further concedes that the Appellant's right to interfere with, control or regulate the operations of the Appellee's project was dependent upon the rights given the Appellant as the sole preferred stockholder in Appellee's corporation. Appellant's Brief at page 5 reads as follows:

"In order to regulate the mortgagor, the Commissioner was to receive 'certain shares of (the mortgagor's) special stock' which would confer majority voting rights in the event of default under the mortgage, charter or any other agreement between the mortgagor and the Commissioner."

There is no question in this case of any default under the mortgage or the violation of any agreement. It is only necessary, therefore, to determine whether the Appellee has violated any of the provisions of the charter.

Fifth: Examination of the charter will disclose that the rental of apartments in the Appellee's building for less than thirty days was not designated as a default under the charter. It is uncontradicted that Appellant prepared and supplied the charter and required Appellee to use it. Reference to the charter will show that the Appellant in preparing the charter and in determining the type and kind of control it desired to exercise over Appellee's project, gave consideration to the term of rental of apartments in Appellee's building and elected to limit the maximum but not the minimum term of rental in the building by the use of the provision: "Dwelling accommodations of the corporation shall not be rented for a period in excess of three years."

Sixth: We maintain that there is no ambiguity in the terms of the charter and that this Court should construe the rights of the parties in accordance with the wording of the charter, which not only does not prohibit rentals of apartments in Appellee's building for less than thirty days, but in fact implies the right of such rentals. However, if it is felt that there is some ambiguity in the wording of Appellee's charter, we maintain that any such ambiguity should be resolved against Appellant both because Appellant wrote the charter and because Appellant has consistently construed such charters as permitting transient rentals. We furthermore maintain that the construction that the Appellant (being the administrative agency charged with the enforcement of the Act) has consistently placed on such charters prior to the Housing Act of 1954 should have great weight with the Court.

Seventh: We will show that the Hotel Association, in persuading Congress to pass Section 513 of the Housing Act of 1954 prohibiting "operation for hotel or transient purposes" in FHA-insured projects, stated as the necessity for the Act that the officials of the Federal Housing Administration had consistently interpreted the provisions of Section 608 as permitting transient rentals or rentals for less than thirty days. We will further show as disclosed by the record that when the Appellee in this case asked the Appellant by what authority it sought early in 1955 to prohibit the rental of some of the apartments in Appellee's project for less than thirty days, that the Appellee was advised by the Deputy Assistant Commissioner (Multifamily Housing), formerly Chief Counsel of the Rental Housing Division, that a *new* law, the Housing Act of 1954, prohibited rentals for less than thirty days.

Eighth: We maintain and urge that if Section 513 of the Housing Act of 1954 is so construed as to make its prohibition of "operation for hotel and transient purposes" apply retroactively to Appellee's incidental rentals for less than thirty days, such construction and application would amount to an unconstitutional retroactive application of the Act, depriving Appellee of its vested rights and taking the property of Appellee without due process of law.

Ninth: We will show that a careful reading of the 1954 Act will disclose that Congress appreciated that it could not pass a law that would retroactively deprive a citizen of vested rights and that the wording of the Act in fact exempts and excludes from its provisions projects such as the Appellee's, insured prior to the enacting date of the said Act.

Tenth: We will show that Section 513 of the Housing Act of 1954 was conceived, promoted, designed and intended to serve only a selfish private interest, and that the Act

serves no public purpose whatsoever, and if enforced will produce results contrary to the public interest, bring about mortgage foreclosures, loss by the Federal Housing Administration of insurance reserves, all to the detriment of the public interest and loss to the taxpayers of this country.

ARGUMENT

I. There is nothing in Section 608 of the National Housing Act, in any pertinent regulation thereunder in effect on December 30, 1949, or in appellee's charter directly or indirectly prohibiting rentals of apartments in appellee's apartment project for terms of less than thirty days

We join with the Appellant in its statement found on page 19 of its Brief that underlying the holding of the Court below was the premise that prior to the Housing Act of 1954 the Appellee had the right to rent apartments in its building for periods of less than thirty days. As previously stated in this Brief, the Appellant has conceded that at the time of the insurance of Appellee's note and mortgage, December 30, 1949, there was no provision in law, the rules and regulations of the FHA, in the charter or by-laws of Appellee corporation or the note and mortgage insured by the Appellant, prohibiting the rental of apartments in Appellee's project for periods of less than thirty days, but Appellant has tried hard to extract such a prohibition from the legislative history. The short answer is that:

> "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco* v. *Walling*, 324 U.S. 244, 260; quoted in *Ex Parte Collett*, 337 U.S. 55, 61.

We ask the Court throughout in determining the rights of the parties, to keep in mind the following salient facts which will hereafter be referred to in more detail:

That the Federal Housing Administration is an agency of the Federal Government created by Act of Congress for the purpose of engaging in the business of insuring real estate mortgages; with authority to sue and be sued in any court of competent jurisdiction in like manner and extent as a private corporation and that its regulations and contracts are to be strictly construed against it. *Federal Housing Administration* v. *Burr*, 309 U.S. 242; *Cole* v. *Young*, 351 U.S. 536; *Garrison* v. *United States*, 7 Wall. 688, 690; see also *Ferguson* v. *Union National Bank*, 4 Cir., 126 F. 2d 753.

A. The Federal Housing Administration in Its Control Over the Plaintiff Corporation Is Limited to Such Rights as It Had Under the National Housing Act, the Rules and Regulations of the Commissioner and Any Contracts Between the Parties as Were in Effect on December 30, 1949.

We submit that the Federal Housing Administration, Appellant herein, recognized that in order to induce private capital to undertake the construction of Veterans Emergency Rental Housing projects, assurance was necessary that the rights of all parties should be fixed and that no rights should be subject to the uncertainties of future changes in the rules and regulations of the Federal Housing Administration. Therefore, Appellant, as a guarantee to the builders of such projects, issued regulations to effect such assurance.

We refer the Court to the following pertinent sections of the 1949 edition of the Code of Federal Regulations, Title 24, Housing and Housing Credit, Part 282, dealing with Multifamily War Housing Insurance:

Section 282.1:

"*Citations.* The regulations in this part may be cited as 24 CFR, Part 282, and referred to as 'Regulations of the Federal Housing Commissioner under Section 608 of the National Housing Act, issued May 26, 1942'."

Section 282.19:

"*Amendments to Regulations.* The regulations in this part may be amended by the Commissioner at any time and from time to time, in whole or in part, *but such amendment shall not affect the contract of insurance on any mortgage already insured or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure.*" (Emphasis added.)

Section 282.20:

"*Effective Date.* The regulations in this part shall be effective *as to all mortgages with respect to which a commitment to insure under section 608 is issued on or after August 15, 1946.* * * *" (Emphasis added.)

The foregoing regulations were spelled out in the Code of Federal Regulations published by the United States Government and in existence at the time the contract of insurance of Appellee's mortgage was executed December 30, 1949, and available to the parties for their guidance during the negotiations between them. The parties had a right to rely upon the terms of such regulations and are bound by them.

Reference to the endorsement of the Federal Housing Administration upon the reverse side of the mortgage note in question shows (R. 106-107):

"Insured under section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949.

"To the extent of advances approved by the Commissioner.

"Federal Housing Commissioner, by H. E. Bailey, Authorized Agent.

"Date, December 30, 1949."

We repeat: *"Insured under section 608 of the National Housing Act and Regulations thereunder of the Federal Housing Commissioner in effect on December 30, 1949."*

B. The Law in Effect on December 30, 1949 Governing the Rights and Obligations of the Parties

As previously shown in this Brief, supra, pp. 11-21, Section 608, as amended by the Veterans Emergency Housing Act of 1946, was intended and designed exclusively to furnish temporary rental accommodations for the returning veterans of World War II. The caption of the Veterans Emergency Housing Act is as follows:

"An Act to expedite the availability of housing for veterans of World War II by expediting the production and allocation of materials for housing purposes and by curbing excessive pricing of new housing, and for other purposes." (60 Stat. 207.)

The Act provided:

"This Act may be cited as the 'Veterans' Emergency Housing Act of 1946'."

The housing shortage for veterans continued from year to year and section 608 was extended through March 1, 1950. The reason for the Veterans Emergency Housing Act is given as follows in Section 10 (a) thereof:

"In order to assist in relieving the acute shortage of housing which now exists and to increase the supply of

housing accommodations available to veterans of World War II. * * *" (60 Stat. 212)

The law provided that the only limit on the use of a rental housing project insured thereunder was that preference of occupancy of the projects should be given to (a) Veterans of World War II; (b) immediate families of veterans of World War II, Section 10 (f) (2) of the Act reading:

"Preference or priority of opportunity in the occupancy of the mortgaged property for veterans of World War II and their immediate families * * * shall be provided under such regulations and procedures as may be prescribed by the Administration." (60 Stat. 214.)

As will be hereinafter shown by reference to the Act, all other limitations on the use of the apartments in the building were left to the discretion of the Commissioner in the exercise of his authority as the sole preferred stockholder in said corporation. We will further show that he did not elect to prohibit rentals of apartments in Appellee's project for terms of less than thirty days.

C. The National Housing Act—Title VI, Section 608

The National Housing Act will show that the only provision of section 608 of title VI in effect on December 30, 1949, granting the Commissioner authority to regulate in any manner whatsoever a project constructed under that section is contained in subsection (b)(1) thereof as follows:

"The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges,

capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with and acquire for not to exceed $100 stock or interest in any such mortgagor as the Commissioner may deem necessary to render effective such restriction or regulation. * * *" (56 Stat. 303; 12 USC 1743 (b) (1)).

It is to be noted that this provision of the law imposes no regulations upon the operation of mortgagor corporations such as the Appellee, but merely authorizes the Commissioner "in his discretion" to require such mortgagor corporations to be regulated and to acquire for that purpose stock or interest in such corporations.

D. Administrative Rules and Regulations of The Federal Housing Commissioner

Looking into the Administrative Rules and Regulations of the Federal Housing Commissioner, applicable to mortgages insured under Title VI, Section 608 of the National Housing Act, we find in 24 CFR 283.28 that the Commissioner did elect to exercise his discretion by requiring the regulation of corporate mortgagors, such as Appellee through the ownership of special stock therein, the regulation reading as follows:

"(a) A corporate mortgagor or trust shall be regulated through the ownership by the Commissioner of certain shares of special stock (or other evidence of beneficial interest in the mortgagor) which stock or interest will acquire majority voting rights in the event of default under the mortgage or violation of provisions of the charter of the mortgagor, or the violation of any valid agreement entered into between the mortgagor, the mortgagee and/or the Commissioner, but only for a period co-extensive with the duration of such default or violation. * * *"

It will be noted that such regulation by the Commissioner was to be exercised exclusively through the ownership "of certain shares of special stock", and that such stock would acquire majority voting rights only in the event of (1) default under the mortgage, or (2) violation of the provisions of the charter of the mortgagor, or (3) violation of any valid agreement entered into between the mortgagor, the mortgagee and the Commissioner.

Under the terms of this regulation, which has the force and effect of law, before the Commissioner could exercise any control over the mortgagor, one of the above mentioned conditions would have to occur. There is no question in the present case of any default under the mortgage or the violation of any agreement between the mortgagor and mortgagee and/or the Commissioner. The only remaining question then is whether Appellee has violated any of the provisions of its charter, which we ask the Court to recall, was of a specific form, containing the wording and provisions required and prescribed by the Federal Housing Administration (Pl. Ex. 19; R. 42, 184-192).

E. Provisions of Corporate Charter

The only rights which Appellant has to control rentals of apartments in Appellee's building are those derived from Appellant's ownership of preferred stock in the Appellee corporation. As Appellant has conceded, in Note 7 on page 9 of its Brief filed herein:

> "This and all other powers afforded the Administration under appellee's charter result from the Administration's ownership of appellee's preferred stock."

An examination of Appellee's charter is therefore necessary in order to determine just what powers it grants to Appellant as preferred stockholder. Article Fifth, paragraph (e) of such charter provides the only method of

exercising control by the preferred stockholder, the ouster of existing directors and installation of new ones of Appellant's choice, only in the event of "default" by the corporation, the pertinent portion of such article reading as follows:

> "(e) in the event of any default by the corporation, as hereinafter defined, and during the period of such default, the owners of the preferred stock, voting as a class shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead." (Pl. Ex. 19; R. 42, 186.)

Reference to the charter will show that the failure of the corporation to perform any of the conditions or provisions of the charter would be considered a default thereunder. Therefore, to determine whether the rental of apartments in Appellee's building for less than thirty days was a default under the charter will require an examination of the charter.

"Default" is defined in detail in Article Seventh, paragraph (a), as among other things, the failure of the corporation to perform any of the covenants, conditions or provisions required by the charter. Such paragraph reads as follows:

> "(a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after commencement, any receivership, bankruptcy or other form of liquidation instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by the terms of such instruments; (3) the failure

of the corporation to establish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties, or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated." (Pl. Ex. 19, R. 42, 187.)

The covenants, conditions and provisions required of Appellee by its charter are set out in detail in Article Sixth and in Article Eighth, paragraph (a)(1) as follows:

"Sixth. The corporation shall not without prior approval of the holders of a majority of the shares of Preferred Stock, given either in writing or by vote at a meeting of the Preferred Stockholders called for that purpose (a) assign, transfer, dispose of or encumber any real or personal property, including rents, except as specifically permitted by the terms of the mortgage, (b) remodel, reconstruct, demolish or subtract from the premises constituting the project and subject to such mortgage, (c) permit the occupancy of any of the dwelling accommodations of the corporation except at or below the rents fixed by the schedule of rentals provided hereinafter, (d) require as a condition to the occupancy or leasing of any unit in the project the purchase of any corporate stock either from the corporation or any stockholder or the payments of any consideration other than the reasonable rental provided for in the schedule of rentals to be filed with and ap-

proved by the holders of the Preferred Stock, as provided hereinafter, (e) consolidate or merge the corporation into or with any other corporation; go into voluntary liquidation; carry into effect any plan of reorganization of the corporation; redeem or cancel any of its shares of Preferred Stock, or effect any changes whatsoever in the capital stock; alter or amend the certificate of incorporation or fail to establish and maintain reserves as set forth in this Certificate of Incorporation, (f) require as a condition to the occupancy or leasing of any unit in the project the payment to or deposit with the corporation, or any person or persons, of any amount other than the payment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the covenants of the lease." (Pl. Ex. 19; R. 42, 187.)

"Eighth. The following provisions are hereby adopted for the conduct of the affairs of the corporation and in regulation of the powers of the corporation, the directors and the stockholders.

"(a)(1) Dwelling accommodations of the corporation shall be rented at a maximum average rental per room per months fixed by the Board of Directors of the corporation and approved by the holders of the Preferred Stock. A schedule of rentals for the reasonable rental value of each apartment based upon the average as so determined shall be filed with the holders of the Preferred Stock, prior to leasing or offering for lease of any of the dwelling accommodations of the project, and when approved by them, shall thereafter be maintained except as provided in Article Sixth hereof. *Dwelling accommodations of the corporation shall not be rented for a period in excess of three years* nor shall

the property be rented as an entirety without prior written approval of the Preferred Stockholders. Store accommodations shall be rented at a rental to be fixed by the directors with the prior written approval of the holders of the Preferred Stock. (2) The corporation shall have the right to charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between tenant and the corporation with the written approval of the holders of a majority of the shares of Preferred Stock, for any facilities and/or services which may be furnished by the corporation to such tenant upon his request, over and above the facilities and services to which such tenant may be entitled by virtue of his lease, including among other things, telephone operator and switchboard services, electric current, gas, air cooling and conditioning and other additional or extraordinary facilities or services which may be furnished by the corporation in connection with the operation of such housing facilities.'' (Pl. Ex. 19; R. 42, 189-190; emphasis added.)

Careful scrutiny of the above quoted charter provisions, being the only pertinent parts thereof, discloses no language whatsoever suggesting, directly or indirectly, any prohibitions against the rental of apartments in Appellee's building for any periods of less than thirty days. An examination of these charter provisions does disclose, however, that the Commissioner gave consideration to the term of rentals of apartments in the building and elected to prohibit such rentals for any periods in excess of three years, the Commissioner's exact language being, ''Dwelling accommodations of the corporation shall not be rented for a period in excess of three years.'' (Article Eighth (a)(1) above.)

The Commissioner, having given consideration to the terms of rental of apartments in the Appellee's project, and having specifically chosen to limit the maximum term of such rental of such apartments, and having failed to limit the minimum term of such rentals, we submit, shows an intention on his part to not place any minimum limit on the rental term for which an apartment might be rented, and that the general rule of construction of statutes and contracts is indeed applicable here. The general rule, we feel, is concisely stated in 82 C.J.S. 668; Statutes, Sec. 333a:

> "Under the general rule of express mention and implied exclusion, the express mention of one matter excludes other similar matters not mentioned; every positive direction in a statute contains an implication against everything contrary to it; the specification of one particular class excludes all other classes; and an affirmative description of powers granted implies a denial of non-described powers."

The charter sets out in detail the matters subject to regulation by Appellant as preferred stockholder. Those matters are specifically enumerated, and any others are just as specifically excluded under the maxim:

> "The expression of the one is the exclusion of the other." *Arthur* v. *Cumming*, 91 U.S. 362, 364.
>
> "Generally speaking a 'legislative affirmative description' implies denial of the nondescribed powers." *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533.

The Appellant in its brief, page 31, attempts to contend that the provision in the charter "engage in no business other than the construction and operation of a rental housing project or projects" should be construed to prohibit

the rentals of apartments in Appellee's project for less than thirty days. We submit that such contention is without any merit. There is certainly nothing in the term, "operation of a rental housing project or projects" which would preclude the rental of some of the apartments in such project for less than thirty days when there was no demand for such apartments for a greater period of time.

The charter of the Appellee corporation (Pl. Ex. 19; R. 42, 184, 185) shows the purpose of the corporation as follows:

> "Third: The purpose for which the corporation is formed and the business and objects to be carried on and promoted by it are as follows:
>
> "(d) * * * So long as any property of this corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner it shall engage in no business other than the construction and operation of a rental housing project or projects.
>
> "(e) to enter into, perform and carry out contracts of any kind necessary to, or in connection with, or incidental to the accomplishment of any one or more of the purposes of the corporation."

We submit that the normal operation of an apartment building such as Appellee's, containing as it does twelve stories and 156 apartments, contemplates that, from time to time there would be the rental of some of the apartments in the buildings, if condition demanded, for terms of less than thirty days. Such incidental rentals are provided for in Article Third (e) of the charter, quoted above.

To Summarize:

First: Section 608 of the National Housing Act left it to the discretion of the Commissioner to determine whether he would attempt to control the operation of a 608 project, such as the Appellee's apartment building;

Second: The Commissioner elected to control the operation of the Appellee's apartment building through the ownership of all preferred stock in the Appellee's corporation;

Third: The only restriction placed upon the term of rental of an apartment was that an apartment could not be leased for more than three years.

F. Limitation Upon Use of Projects Constructed Under Title VI, Section 608, of The National Housing Act

We submit that this case is not concerned with the authority, (or lack of it) on the part of the Appellant to "insure hotel properties", but rather, with its authority to insure mortgages upon certain types of rental properties.

We refer the Court to 24 C.F.R. 280.34 of the Administrative Rules and Regulations under Section 608 of the National Housing Act which were in effect at the time of the insurance of the mortgage, which reads:

> "280.34. *Development of property.* At the time the mortgage is insured the mortgagor shall have constructed and completed or shall be obligated to construct and complete new housing accommodations on the mortgaged property *designed principally for residential use, conforming to standards satisfactory to the Commissioner*, and consisting of not less than eight (8) rentable dwelling units on one site and may be detached, semidetached, or row houses, or multifamily structures." (Emphasis added.)

This regulation relates, as noted, only to the design and does not attempt to require such building to be designed "exclusively" for residential purposes as contended by the Appellant, but that it merely be designed "principally"

for residential use. The word "principally" does not mean "exclusively", but means chiefly, mainly, primarily, or in the greater part.

Black's Law Dictionary (3d ed., 1933) defines "principal" (p. 1415) as "chief; leading; most important or considerable; primary, original, highest in rank, authority, character, importance, or degree." In contrast, the same dictionary defines "exclusively" (p. 715) as "only, solely, purely, wholly, to the exclusion of other things."

The words "principally engaged", in a statute exempting from execution certain articles necessary to carry on the occupation in which one is principally engaged, are not to be construed with reference to the productiveness or profit of one kind of business over another, where two or more occupations are followed at the same time, but with reference to the occupation or business on which the party *chiefly* relies for a livelihood, and that engrosses *the most of his time and attention*, not for a day, or a week, or a month, but through the year. *Smalley* v. *Masten*, 8 Mich. 529, 530.

We submit that the word "principally" carries no connotation of exclusiveness; that the words "principally for residential use" do not mean "exclusively for residential use"; that they mean "chiefly, mainly, primarily for residential use", and that as long as Appellee's apartment building is employed *chiefly, mainly* or *primarily* or *for the most part* for residential use, Appellee corporation is strictly complying with the requirement of the law and regulations.

We submit that any attempt to give the word "principally" an interpretation meaning "exclusively" would be contrary to ordinary, common meaning and understanding of the word "principally" and contrary to the legal presumption that Congress, in enacting laws, or rule making

bodies in promulgating rules, understood the meaning of the words used and then used them in their ordinary and common meaning.

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar." *United States* v. *Goldenberg*, 168 U.S. 95, 102, 103.
>
> "Congress will be presumed to have used a word in its usual and well-settled sense." *United States* v. *Stewart*, 311 U.S. 60, 63.
>
> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification'. Levy's Lessee v. M'Cartee, 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws'. Maillard v. Lawrence, 16 How. 251, 261. And see United States v. Buffalo Gas Co., 172 U.S. 339, 341; United States v. First Nat. Bank, 234 U.S. 245, 258; Carminetti v. United States, 242 U.S. 470, 485. As was said in Lynch v. Alworth-Stephens Co. 267 U.S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" *Old Colony R. Co.* v. *Comm'r of Int. Rev.*, 284 U.S. 552, 560

Appellant is asking the Court to change or distort the meaning of the word "principally" so as to mean "exclusively". It is asking this Court to change the wording of 24 C.F.R. 280.34 from "mortgaged property designed *prin-*

cipally for residential use" to "mortgaged property designed *exclusively* for residential use." We do not believe that this Court will ever adopt such a distorted construction. In *62 Cases, More or Less,* v. *United States,* 340 U.S. 593, 596, this Court said:

> "But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

Upon the undisputed facts of this case, we submit that Appellee's project—The Darlington—has never been operated in any manner prohibited by or even inconsistent with the pupose or provisions of Section 608, the Federal Housing Administration Rules and Regulations or the Darlington's charter. As previously stated, the Darlington is not a hotel and is not operated as a hotel. There can be no question that the Darlington is both *designed* and *used* "principally for residential purposes."

The facts in the case at bar are strikingly similar to those involved in the New York case of *People ex rel. Waitt Operating Co., Inc.* v. *Goldfogle et al,* 121 Misc. Rep. 341, 201 N.Y. Supp. 262. That case involved the application of a New York City ordinance which exempted from certain taxation new buildings "planned for *dwelling purposes exclusively, except* hotels." (Emphasis added.) The only question was whether or not plaintiff's building—called "Hotel Weylin"—was a hotel within the meaning of the ordinance. (The defendants, Commissioners of Taxes and Assessments, had held that it was.) In the words of the Court (201 N.Y. Supp. 262, 263):

> "It is situated at the southeast corner of Madison avenue and Fifty-Fourth street and is 15 stories in height. On the ground floor are stores and a restaurant,

not conducted by the relator, but in part controlled by it, through a rather elaborate contract of lease. There are 141 rooms in the building, substantially 10 on a floor. The suites are so arranged that the rooms may be grouped in suites of 1 and 2 rooms with bath, 3 and 4 rooms and two baths, and 5 rooms with three baths. No suites of more than 5 rooms have ever been occupied as such. One hundred and thirteen rooms are leased to permanent tenants; 28 rooms are used by transients; 74 rooms were furnished by the landlord, of which 56 have been leased on long-term leases, and 28 rooms devoted to transients. At the entrance hall is a small 'desk', with a telephone 'central', with which every room is connected. There are no kitchens in any of the rooms. There is an entrance to the restaurant from the main hall of the building. Linens are supplied to transients and to occupants of the furnished rooms under lease. Very limited personal service is furnished. There are two extra doormen, who do errands in exchange for gratuities. Ice water is obtained in the same way by telephoning the restaurant. There are no public rooms in the building, except a small reception room. The building was originally planned as a 'non-housekeeping apartment house'. Subsequently it was called 'Hotel Weylin', which name has been preserved."

The Court held the Weylin not to be a hotel, using the following language (201 N.Y. Supp. 262, 264):

"* * * I see no ground for holding that this building does not come within the exemptions of the tax ordinance. The mere fact that a building constructed and operated as a hotel in the common acceptance of that term may be occupied by a few tenants on long leases

would certainly not change the character of the building as a whole. The converse is true here. The rooms occupied by transients, forming but 20 per cent. of the total number of rooms, are being so used only temporarily, in order to derive an income therefrom pending attempts to lease them for long terms, like the rest of the rooms. *Even the 'transient' rooms are charged for by the room, and not by the number of persons who occupy them.* The building is without any of the public rooms or public accommodations usually associated with the idea of a hotel. *Under these circumstances I think that the building is to be regarded as having maintained its original character of an apartment house, unaffected by the casual fact that some of the rooms are temporarily devoted to purposes which have some of the elements of hotel accommodation.*" (Emphasis added).

One would have to search far indeed to find two cases involving facts so closely parallel, and we respectfully submit that the logic and language of the Court in the above quoted decision is equally applicable to The Darlington.

G. Administrative Interpretation Placed on Title VI, Section 608 of the National Housing Act by Officials of the Federal Housing Administration

The Appellant has devoted eight pages (30-38) or approximately one-third of its Argument to the assertion that the Federal Housing Administration has uniformly interpreted Section 608 as not entitling owners of insured projects to rent to transients. We quote from Page 30 of Appellant's Brief:

"C. *The Federal Housing Administration has uniformly interpreted Section 608 as not entitling owners of insured projects to rent to transients.*

"Beginning in 1947, long before appellee's project was approved by the Federal Housing Administration, Section 608 was administratively construed as not permitting rentals to transients."

We regret but we must challenge this assertion by the Appellant, for such is not sustained by the facts nor the record in this case.

In its Jurisdictional Statement, Appellant says that it relies for this assertion on the provisions of 24 CFR 280.34 (which provisions require only that Section 608 projects be designed "principally for residential use") (Jurisdictional Statement, p. 5; note 16, p. 16). Since it is obvious that The Darlington Apartments are not only designed, but used, principally for residential use, Appellant's stated reliance upon 24 CFR 280.34 is misplaced. We are therefore forced to believe that possibly Appellant also relies on those portions of Plaintiff's Exhibit 31 (R. 45, 226) which it has printed as Appendix C to its Brief at Page 59, reading in part as follows:

"(p. 6) Rental housing projects in distinctly commercial areas, hotels, apartment hotels, dormitories, club buildings partly devoted to residential use, farm dwellings, or 'company housing' or other housing dependent on a single industry, are not considered acceptable, as they lack these characteristics."

The above has no applicability to the facts in this case. The Darlington is not a hotel. It is certainly not a dormitory or a club building any more than it is a farm building.

The Darlington is a twelve story apartment building consisting of 99 two-room apartments; 11 two-and-one-half-room apartments, 41 three-room apartments, 3 four-room apartments, and 2 six-room apartments. (Pl. Ex. 24-A; R. 43, 194). The Federal Housing Administration, before

construction commenced in connection with the Darlington Apartments, had to find the same acceptable to the Administration or it would have never approved the application for the insured mortgage loan or insured the same.

The further fallacy of the Appellant's assertion that the Federal Housing Administration has uniformly interpreted section 608 as not entitling the owners thereof to rent apartments to transients is conclusively shown by reference to the record in this case.

First, it is conceded that there is no provision in the Act that prohibits rentals of apartments to transients or for less than thirty days.

Second, it is conceded that there is no rule or regulation that would prohibit the rental of apartments in section 608 projects to transients or for less than thirty days.

Third, the Commissioner of the Federal Housing Administration was authorized through preferred stock ownership to regulate by charter provisions the operation of a section 608 project in any manner whatsoever that he desired. No prohibition is to be found in the charter of the corporation preventing the rental of apartments therein to transients or for less than thirty days.

Fourth, the American Hotel Association, in securing the enactment of section 513 of the Housing Act of 1954, under consideration in this case, stated that it sought the passage of the Act in order to prohibit the rentals of apartments in 608 projects to transients or for less than thirty days because the Federal Housing Administration officials had construed the law and the rules and regulations as permitting transient rentals and rentals for less than thirty days, as long as the rental charge per day did not exceed one-thirtieth of the agreed monthly rental. We invite the Courts attention to the testimony of Arthur J. Packard, Chairman of the Board, American Hotel Association, before the Senate Committee on Banking and Currency, during the hearings

on the Housing Act of 1954 (Senate Hearings, Part 1, pp. 655, 656-657; Pl. Ex. 27; R. 44, 196, 198):

> "We have tried for 4 years, through every known administrative approach, to have this problem whipped by the FHA. But having failed in this direction, we are obliged to seek the assistance of your committee, and to appeal to you for some statutory safeguard against this continued unfair competition."
>
> . . . . . .
>
> "As I mentioned before, we have tried for 4 or 5 years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743(b)(1), in connection with section 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved. At the outset, the agency always required approval of all rent schedules. And these were normally expressed in monthly rentals. But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice."

Fifth, the Appellant's witness, W. Withers Adickes (R. 68), Assistant State Director for South Carolina and former State Director, testified that it was not until February 1952, some years after the insurance of the mortgage over the Appellee's apartment project, that his office ever received any notice that there would have to be a stipulation in

connection with section 608 projects against rental of apartments for less than thirty days. We quote the testimony (R. 74):

> "Q. Is this the first notice that you recollect that the Federal Housing Administration received where it stated that you would have to put into the contract a stipulation that there should not be rented any apartment for less than 30 days? A. That is the first one I remember.
>
> "Q. As far as you remember, that is the first time? A. As far as I know, that is the first.
>
> "Q. And that is the—— A. February '52."

Sixth, the complete fallacy of any assertion that the Federal Housing Administration had uniformly interpreted section 608 as prohibiting transient rentals is shown by the necessity for the passage of section 513 of the Housing Act of 1954—if such transient rentals were prohibited, why the necessity for the Act? Further, the wording of section 513, paragraph (b) acknowledges that the Commissioner had permitted transient rentals for less than thirty days in section 608 insured projects. We quote from the Act, (Appendix "A" page 86):

> "(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area

which the Commissioner determines to be a resort area, * * *."

Seventh, just how the Federal Housing Administration has uniformly interpreted section 608 as not entitling owners of insured projects to rent to transients and yet has allowed exceptions in 10,669 apartments in the State of Florida alone is hard to conceive. The 23rd Annual Report of the Federal Housing Administration for the year ending December 1956 shows, Table III-16 on page 30, that it had insured under section 608 in the State of Florida 10,669 apartment units and the Congressional Record for July 28, 1954, (100 Cong. Rec. 11,883) shows that the whole State of Florida is a resort area under the bill, and we quote:

"Mr. Smathers. Mr. President, will the able chairman yield so that I may ask a question of him?

"Mr. Capehart. I yield.

"Mr. Smathers. I call the able chairman's attention to that paragraph on page 23 of the conference report where reference is made to tourist areas. With respect to section 603 and 608 projects is it the Senator's understanding that a tourist area in Florida would include the whole State of Florida?

"Mr. Capehart. I would think that the State of Florida would be considered a tourist area. I would say so."

Lastly, and we take it to be an admission, the Appellant, on August 17, 1956, forwarded to all mortgagors under Section 608 a letter (Pl. Ex. 43; R, 126, 237), in which it stated as follows:

"*Recent determinations* with respect to Administrative policy have resulted in amendments to the rules of the Federal Housing Administration and the issuance of a revised Model Form of Corporate Charter, * * *". (Emphasis added.)

Attached to the said letter going to all mortgagors under Section 608 was the new model form of corporate charter (Pl. Ex. 43; R, 126, 239) where the Federal Housing Administration, for the first time in the year 1956, placed in its charter the following new provisions: that the corporation to be formed would be for the purpose of renting apartments therein on a monthly or yearly basis and that the dwelling accommodations therein could not be rented for periods of less than one month. We quote from the charter, Articles III and VII (Pl. Ex. 43; R, 126, 239-240):

"ARTICLE III—PURPOSES

The purpose for which the Corporation is formed and the business and objects to be carried on by it are as follows:

"(a) To create a private Corporation to construct and operate a rental housing project • • • for the rental of units on a *monthly* or yearly basis." (Emphasis added.)

• • • • • • •

"ARTICLE VII—PROVISIONS FOR CORPORATE OPERATION

• • • • • • •

"Dwelling accommodations shall not be rented for periods of *less than one month* nor in excess of three years." (Emphasis added.)

It is regrettable, to say the least, if the Federal Housing Administration had ever intended, prior to the Housing Act of 1954, that it would prohibit rental of apartments in Section 608 projects for less than thirty days, that such provisions were not inserted by the Appellant somewhere

in the charters which it wrote and prescribed for the Appellee and other contemporary builders who responded to the call to provide temporary housing for the returning veterans of World War II.

We submit, as the Court below stated (R, 116-117), in truth and in fact, the Federal Housing Administration never thought, nor cared, whether apartments in Section 608 projects were rented for thirty days or less. It was busy carrying out the mandate of Congress to provide housing for veterans.

This Court has stated in a somewhat similar situation where no consideration was given by Congress to the subject matter of the case, as follows:

> "Ascertainment of the intention of Congress in this situation is impossible. *It is to indulge in a fiction to say that it had a specific intention on a point which never occurred to it.* Had the omission of a direct prohibition of this employment been called to its intention, it might well have supplied it, for any reason we can see. Congress of course has the right to be indirect where it could be direct and to be obscure and confusing where it could be clear and simple. But had it determined to reach this employment, we do not think it would have done so by artfiice in preference to plain terms. *It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction.* We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process." *Western Union Telegraph Co.* v. *Lenroot*, 323 U.S. 490, 508. (Emphasis added.)

H. The Appellant Is Engaged In The Insurance Business And Is Subject To All Laws And Rules Of Contract Construction Applicable To Private Corporations And All Ambiguities In Its Regulations Must Be Construed Against It

That the Federal Housing Administration is in the insurance business is shown in its Handbook for Employees (Pl. Ex. 32, R, 45, 227):

> "The first thing to learn about the FHA is that it does not lend money and does not plan and build housing • • •"
>
> "• • • *the FHA provides insurance against loss on several types of loans made by private lending institutions.*" (Emphasis added.)
>
> • • • • • • •
>
> "All mortgage loans insured by the FHA provide for • • • the FHA mortgage insurance premium of 1/2 of 1 percent annually on outstanding balances • • •."

Other courts have recognized the role of the Federal Housing Administration in the insurance business:

> "Defendant contends that the United States has not agreed to pay interest in such a case. The answer is that the United States agreed to be sued as an insurer; and the recovery of interest for delay in payment is an ordinary incident of a suit on an insurance contract." *Ferguson* v. *Union National Bank*, 4 Cir., 126 F. 2d 753, 759.

This Court has held:

> "• • • it must be presumed that when Congress launched a governmental agency into the commercial

world and endowed it with authority 'to sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be." *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245.

This Court in *Lynch* v. *United States*, 292 U.S. 571, 578, said:

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

At Page 580:

"'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen' The Sinking Fund Cases, 99 U.S. 700, 719."

There is no ambiguity or uncertainty in the wording of Section 608 nor in the rules and regulations of the Commissioner thereunder, nor in Appellee's charter. We respectfully submit, however, that if any doubt or uncertainty does exist, it should be resolved in favor of Appellee. *Garrison* v. *United States*, 7 Wall. 688; *Cole* v. *Young*, 351, U.S. 536. Thus in *Garrison* v. *United States*, this Court said (7 Wall. 688, 690), in construing ambiguous language used by the Government in a contract:

"Its doubtful expressions should, therefore, according to a well known rule be construed most strongly against the party who uses the language."

And in *Cole* v. *Young*, this Court said (351 U.S. 536, 556) in construing an executive order characterized as "awkward":

> "Moreover whatever the practical reasons that may have dictated the awkward form of the order, its failure to state explicitly what was meant is the fault of the government. Any ambiguities should therefore be resolved against the government . . . ."

Certainly, the failure to state explicitly in the Federal Housing Administration's Rules and Regulations or in Appellee's charter an intention that rentals for less than thirty days were prohibited (if any such intent in fact existed, which we deny), was exclusively the fault of Federal Housing Administration, Appellant herein.

As to The Second Question

II. Appellant cannot use the terms of Section 513 of the Housing Act of 1954 to retroactively deprive the appellee of its right to rent some of the apartments in its building for less than thirty days

As shown above, the Appellee was not prohibited by any terms or provisions of the Housing Act, the rules and regulations of the Commissioner, the Appellee's charter of incorporation, or any contract in effect on December 30, 1949, the date of insurance of the mortgage in question by the Appellant, from renting apartments in its building for terms of less than thirty days. There being no such prohibition, the Appellee had the right to rent such apartments for terms of less than thirty days, or indeed, for any term not in excess of three years. Having this valuable right, and having exercised such right free and unmolested for a period of approximately three years,

Appellee urges that such right was a vested right, and is protected by the United States Constitution.

A. Definition of "Vested Right"

The following definitions of the term "vested right" have been consistently followed by our courts:

> "A 'vested right' is defined by Fearne, in his work upon Contingent Remainders, as 'an immediate, fixed right of present or future enjoyment'; and by Chancellor Kent as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment'. 4 Kent, Comm. 202 It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest' • • • Const. Law 332." *Pearsall* v. *Great Northern Ry. Co.*, 161 U.S. 646, 673.
>
> "It is defined as 'an immediate fixed right of present or future enjoyment' and 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' • • •. A right is 'vested' when there is an ascertained person with a present right to present or future enjoyment; • • •" 11 Am. Jur. 1199, Const. L., Sec. 370.
>
> "Vested rights may be created by the common law, by statute, or by contract. No matter how created, they are entitled to the same protection." 11 Am. Jur. 1200, Const. L., Sec. 371.

We submit that the Appellee's right to rent apartments in its building for terms of less than thirty days has been shown to be a most valuable and substantial right, necessary to protect the Appellee from the loss of its property

and its investment of some four hundred thousand dollars (R 5, 103), and necessary to provide the funds for the Appellee to make the payments called for by its mortgage; and is so obviously a vested right such as is entitled to constitutional protection, that we will forego further argument on that point.

B. Vested Rights May Not Be Impaired By Retroactive Or Retrospective Laws

While there is no direct constitutional prohibition against the enactment by Congress of retrospective legislation, such legislation cannot operate retroactively so as to impair or divest "vested rights", and any attempt now on the part of the Appellant to construe or apply the terms of the Housing Act of 1954 so as to prohibit the Appellee from renting apartments in its building for terms of less than 30 days, would divest, destroy, or impair a vested right of the Appellee and would result in an unconstitutional retroactive operation of the Housing Act of 1954.

While the Constitution does not prohibit retrospective legislation, as such, by the Congress, such legislation cannot destroy or impair vested rights.

> "In the sense in which it is constitutionally objectionable, * * * a retroactive or retrospective law, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past * * *." 16-A C.J.S. 91, Const. L., Sec. 414

Since its establishment this Court has in an unbroken line of decisions, protected the citizens in the enjoyment of their vested rights. This principle was clearly and forcibly announced by this Court in the famous "Dartmouth Col-

lege Case" (*The Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518) which involved the construction of the rights of Dartmouth College under the charter granted it by the King prior to the independence of the United States. Chief Justice John Marshall stated (4 Wheat. 518, 625):

> "On the judges of this court [the United States Supreme Court] then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink."

It is true that the Dartmouth College case involved the attempted impairment of a contract by a State legislature, but this Court has repeatedly held that contracts and vested rights are protected from Congressional interference by the Fifth Amendment to our Constitution. The doctrine is well expressed in *Union Pacific Railway Co.* v. *United States* (The Sinking Fund Cases), 99 U.S. 700, decided in 1878, which case involved the construction of a contract between the United States Government and the Union Pacific Railway Company, and the attempt of Congress through subsequent legislation to change the terms of the contract or impose additional obligations on the railroad company. In that case this Court held (99 U.S. 700, 719):

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back

to themselves, without making compensation, the lands they have given this Corporation to aid in the construction of its railroad. Neither can they by legislation compel the Corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that term implies as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Again in the case of *Lynch* v. *United States*, 292 U.S. 571 this Court, in a unanimous decision involving the retroactive provisions of an Act of Congress affecting the rights of the Plaintiff under a War Risk Insurance Contract, held as follows (292 U.S. 571, 579-580):

"The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central Pacific R. Co., 118 U.S. 235, 238; United States v. Northern Pacific Ry. Co., 256 U.S. 51, 64, 67. *When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.* That the contracts of war risk insurance were valid when made is not questioned. As

Congress had the power to authorize the Bureau of War Risk Insurance to issue them, *the due process clause prohibits the United States from annulling them*, unless, indeed, the action taken falls within the federal police power or some other paramount power.

"The Solicitor General does not suggest either in brief or argument that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States.' *Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.* No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But *Congress was without power to reduce expenditures by abrogating contractual obligations of the United States.* To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen'. The Sinking Fund cases, 99 U.S. 700, 719." (Emphasis added.)

We respectfully submit that the Appellee's vested right to rent apartments in its building for terms of less than

thirty days is protected by the Constitution against impairment whether by Congress or by the Federal Housing Administration.

C. Interpretation of Legislative Intent Is a Judicial Function

Section 513(a) of the 1954 Amendment to the National Housing Act states:

> "That Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use, and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding."

Section 513(e) of said Amendment states that:

> "The term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for any period less than 30 days shall in any event constitute rental for such purposes."

We submit that such declaration of its intent by Congress, although binding upon the courts in situations occurring subsequent to its enactment, cannot relate back retroactively to affect substantial vested rights in existence before its passage.

This Court has consistently held that the interpretation of statutes is a judicial, not a legislative function, and that a legislative declaration of legislative intent cannot operate retroactively so as to invade prior rights.

> "Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to

bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are passed, provided no constitutional right of the party concerned is violated." (*Stockdale* v. *Atlantic Insurance Co.*, 20 Wall. 323, 331.)

"It is undoubtedly true that, in our system of government the law-making power is vested in Congress, and the power to construe laws in the course of their administration between citizens, in the courts. And it may be conceded that Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute." Ibid., 20 Wall 323, 331.

This Court, following the reasoning and logic in *Stockdale* v. *Atlantic Insurance Co.*, supra, in the case of *Town of Koshkonong* v. *Burton*, 104 U.S. 668, has specifically held that declaratory laws as far as they attempt to operate on vested rights can have no legal effect. This Court quoted with approval from *Salters* v. *Tobias*, 3 Paige 344, as follows (104 U.S. 668, 678, 679):

"'* * * In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the Legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it.' When counsel in *Ogden* v. *Blackledge*,

2 Cranch 276, announced that, to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point."

We submit a most interesting sidelight that shows the fallacy of one Congress attempting to declare in retrospect what was the intention or the meaning of the words used by a past Congress will be found by reference to the hearings before the Committee on Banking and Currency of the United States Senate in connection with the very statute under consideration here, the Housing Act of 1954. Senator Capehart, sitting as Chairman of said Committee, during hearings in March and April of 1954, said in reference to Section 608, "*I didn't write the law, it was written back in 1940. I wasn't here so I can't tell what the intention was.*" (Senate Hearings, Part 3, p. 1764; Pl. Ex. 28; R. 44, 218; emphasis added).

It, therefore, clearly follows that Section 513 of the Housing Act of 1954 has no application to the Appellee's apartment project and its operation, and that even as a declaratory statute it cannot be related back to the operation of Appellee's apartment project so as to deprive the Appellee of its vested rights retrospectively.

As to the Third Question

III. Is the constitutionality of Section 513 of the Housing Act of 1954 necessarily involved in the determination of the respective rights of the parties to this action?

The wording of section 513 of the Housing Act of 1954 expressly excepts from its provisions projects such as the

Appellee's, operated as it is, which were insured prior to the effective date of the said Act.

The record of this case will show that the Appellee has contended throughout that the wording of section 513 of the Housing Act of 1954 precluded the same from being applied to mortgages insured prior to the passage of the Act. The Honorable Walter E. Hoffman, the District Judge before whom this matter originally came, requested the convening of a three-judge court, stating, and we quote (R. 33):

> "Should Plaintiff ultimately prevail, it is difficult to believe that any court could avoid a full discussion of the constitutionality of this section, as the very wording of the act expresses a retroactive intent."

The Honorable John J. Parker, Chief Judge of the Fourth Circuit, issued an order convening a three-judge court (R. 34). Later, however, after the filing of briefs, in a *per curiam* opinion concurred in by Judge Hoffman and Judge Timmerman, the three-judge court was dissolved on the ground that the real question involved in the present case was one of statutory interpretation rather than the validity of the statute, the *per curiam* opinion reading as follows (134 F. Supp. 337, 338):

> "The apartment house was erected and the mortgage thereon executed by plaintiff and insured by the Federal Housing Administration prior to the passage of the Federal Housing Act of 1954, 68 Stat. 590, and nothing in any of the contracts relating to the construction of the apartment house, the execution of the mortgage thereon or the insuring of the same by the Federal Housing Administration limits the right of plaintiff with respect to the rental of apartments for transient purposes or for less than thirty days. * * * * Since the passage of the Federal Housing Act of 1954 the Fed-

eral Housing Administration has attempted to force plaintiff to desist from this rental practice, contending that same is forbidden by the provisions of that act. Plaintiff contends that the act should not be interpreted to apply to mortgages and guaranties thereof executed prior to its passage and that, if so interpreted, it is violative of provisions of the Constitution of the United States."

And further (134 F. Supp. 337, 339):

"* * * An examination of the pleadings in the light of the applicable law, however, has convinced the members of the court that the case is not one for which a three-judge court is appropriate. While a substantial question as to the constitutionality of the statute in question is raised, if it be given retroactive application, the real question is one of statutory interpretation rather than the validity of the statute * * *."

* * * * * * *

"The three-judge court will, accordingly, be dissolved and the case will be heard by Judge Hoffman * * *."

This case was heard on its merits by District Judge Hoffman, and on June 20, 1956 he rendered his opinion (R. 101-121), holding, and we quote (R. 114-115):

"As to projects committed subsequent to the passage of the 1954 Act, there can be no question as to its constitutionality or applicability. But with respect to projects already in operation, this Court has concluded that the Housing Act of 1954 is ineffective as, under the circumstances, it cannot be made retroactive. A careful study of the 1954 Act will illustrate that plaintiff's right to lease for periods of less than thirty (30) days un-

doubtedly existed prior to that date despite the primary intent of Congress."

Judge Hoffman further held (R. 116):

"* * * Even if it could be successfully argued that plaintiff had no vested right to lease an apartment for a period of less than thirty (30) days, the effect of the Housing Act of 1954 undoubtedly attempts to create a new obligation with respect to a past transaction and hence must fail."

The Appellant appealed direct to this court from the order of Judge Hoffman, and this Court remanded the case for consideration by a three-judge court (352 U.S. 977).

The opinion of the three-judge district court (R. 127-130), (142 F. Supp. 341) shows that the three-judge court adopted the opinion of Judge Hoffman as its opinion (R. 128):

"Upon consideration of the entire record, the briefs and argument of counsel, this court is in accord with the opinion of Judge Hoffman and herein incorporates the same by reference."

However, the three-judge court, as the reasoning for its findings, stated as follows (R. 129):

"We merely hold that the Act of 1954 is not to be given a retroactive effect to previously committed projects except to the extent it is within the reach of the reserved power of regulation."

This appeal is from the decision of the three-judge court.

In reference to the constitutionality of Section 513 of the Housing Act of 1954, this Court in construing such section, we are confident, will apply the following rules as laid down in the decisions of this Court:

"As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied. Panama Railroad Co. v. Johnson, 264 U.S. 375, 390." *Crowell* v. *Benson*, 285 U.S. 22, 46.

This Court in reference to ambiguous statutes has held:

"The rule is fundamental that, if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter. Railway Co. v. Arkansas, 235 U.S. 350, 369." *Arkansas Natural Gas Company* v. *Arkansas Railroad Commission*, 261 U.S. 379, 383.

A careful study of section 513 of the Housing Act of 1954, reveals that it is an ingeniously worded piece of legislation, which at first reading would convey the impression that all of its provisions were to apply to all mortgages insured under the National Housing Act, whether insured prior or subsequent to the effective date of the Housing Act of 1954. A further reading of section 513 (the full text of which is appended hereto for the convenience of the Court; Appendix A, page 86) indicates that the drafters of the Act recognized that any attempt to apply the provisions of Section 513 to mortgages insured prior to its enactment so as to affect the vested rights of mortgagors would be unconstitutional, and that the drafters of the Act limited the Commissioner under the terms thereof to the use of only "appropriate means" (Paragraph "d", Appendix A, page 87) in carrying out the intent of Congress as expressed in the Act. The wording of the Act contains no command that the Commissioner shall apply the prohibitive provisions of Paragraphs (f), (g) and (h) of section 513 against projects the mortgages on which were insured prior to the effective date of the Housing Act of 1954.

REVIEW OF SECTION 513 OF THE HOUSING ACT OF 1954

We invite the Court's attention to some very significant facts concerning Section 513 of the Housing Act of 1954.

First: The enacting clause at the beginning of the Housing Act of 1954 states "that this act may be cited as the 'Housing Act of 1954' ".

Second: Paragraph (a) of section 513 states that it had been the intent of Congress since the enactment of the *National Housing Act* (in 1934) that housing built with the aid of mortgages insured under *that Act* be used *principally for residential use*, and that such intent excludes the use of such housing for transient or hotel purposes.

Third: Paragraph (b) states that no multifamily housing "with respect to which a mortgage is insured *under this Act*" (Housing Act of 1954) shall be operated for transient or hotel purposes. There are two stated exceptions, however, where projects operated for transient or hotel purposes may be insured under the 1954 Act: (1) where the Commissioner had agreed to such operation prior to May 28, 1954, and (2) where the project is located in an area which the Commissioner determines to be a *resort area*, etc.

We submit that the term "this Act" as used in Paragraph (b), specifically refers to the Housing Act of 1954. Mortgages insured under the *1954 Act* would include those for which commitments to insure were issued after its enactment, and also those for which commitments were issued prior to its enactment but which had not yet been insured. Reference is made to the date May 28, 1954—that happens to be the date of the report to the Senate on the Housing Act of 1954 by the Senate Committee on Banking and Currency.

Fourth: Paragraph (c) provides that no mortgage with respect to multifamily housing shall be insured under "this

Act" (*the Housing Act of 1954*) or insured for an additional term unless (1) the mortgagor agrees he will not rent any part of the project for hotel or transient purposes and (2) the Commissioner secures the means to regulate the mortgagor (preferred stock). However, there are two very significant exceptions to this provision: (a) where the commitment to insure was issued prior to the effective date of the 1954 Act, and (b) where the Commissioner had agreed to permit transient rentals or where the project was located in a "resort area." These two exceptions are significant and important because they definitely show that mortgages insured prior to the 1954 Act or projects on which mere commitments to insure were issued prior to the 1954 Act, were specifically excepted from the provisions of section 513 of the Housing Act of 1954 prohibiting "operation for transient or hotel purposes," a positive indication that Congress did not intend that section 513 be applied retroactively to disturb mortgages already insured or for which commitments to insure had already been issued.

Fifth: In Paragraph (d) the term "this Act" is used in two different places. In the first instance the term "this Act" has reference to the National Housing Act as in existence prior to the Housing Act of 1954, for it relates to mortgages insured prior to the enactment of the 1954 Act. In the second instance the term "this Act" has reference to the Housing Act of 1954 for it relates to mortgages insured subsequent to its enactment. Paragraph (d) shows a recognition by Congress that the Commissioner's rights under section 513 would differ depending upon whether the mortgage in question was insured by the Federal Housing Administration *prior to* or *subsequent to* the enactment of the Housing Act of 1954. We submit that this paragraph requires a determination as to what constitutes an "appropriate means at his (the Commissioner's) disposal" to carry out the intent of Congress as expressed in the 1954 Act as

against mortgagors whose mortgages were insured prior to the effective date of the 1954 Act.

We submit that the only appropriate means at the disposal of the Commissioner to enforce the provisions of section 513 dealing with "operation for transient or hotel purposes" in connection with a mortgagor whose mortgage was insured before the enactment of the Housing Act of 1954 would be either through the exercise of such rights as the Commissioner may have had, if any, as preferred stockholder of such corporation, by virtue of charter provisions prohibiting any short-term rentals, or by negotiating with such project owner to obtain a voluntary agreement to prevent such rentals.

It must be remembered, as shown in this Brief and as sustained by the record in this case, it was not until 1952 that the Commissioner promulgated a rule or issued a directive prohibiting transient rentals in section 608 projects. The testimony of the Appellant's witness, W. W. Adickes, shows that not until 1952 did Appellant issue its first instructions requiring prohibitions against transient rentals to be applied in connection with section 608 projects (R. 74). We submit that it would be an appropriate act on the part of the Commissioner if he elected to use the contracts, charter provisions or other instruments that he might have secured in connection with the projects he insured after 1952 against transient rentals to prohibit such rentals.

The Commissioner certainly could appropriately negotiate with any owner of a section 608 project to obtain voluntary agreements against transient rentals. Such appropriate negotiation we submit is shown by the testimony of the Appellant's other witness, Adolphus M. Prothro, Director of the Legal Division of the Federal Housing Administration. When asked what steps had been taken prior to the 1954 Act by the Federal Housing Administration to prohibit hotel operations or transient rentals in

projects insured under section 608, he stated in substance that the owners of such projects, from time to time, would want concessions from the Federal Housing Administration and that the Commissioner would negotiate with the owners who desired the concessions and agree to give the concessions if the owners would agree to forego transient rentals in the projects, the testimony of Mr. Prothro being as follows (R. 93):

> "Q. Tell me again, I am not clear on it, what steps you took—by you, I mean the Federal Housing Administration—before the enactment of the 1954 Act to stop the 608's in existence from accepting transient rentals. A. Usually it would be in the nature of a cease and desist order or a request to refrain from this practice.
> "Q. Would that be a court order? A. No. It would usually be a request on our part to the operator. After all, these people were not dealing——
> "Q. In the event they refused to recognize that request what did you do then? A. First we would use what administrative sanctions we had. We usually had them requesting us for certain things and we would say, 'When you carry out the objectives of the Act as we understand them to be, then we would be more inclined to favor your request'."

"Appropriate means" at the disposal of the Commissioner in connection with mortgages insured after the enactment of the Housing Act of 1954 are set out in detail in paragraphs (f), (g) and (h) of section 513.

Sixth: Paragraph (e) of the Act simply defines the terms "rental for transient or hotel purposes" and "multifamily housing."

Seventh: Paragraphs (f), (g) and (h) of the Act outline in detail the procedures to be used by the Commissioner in

reference to projects insured *after* the effective date of the 1954 Act, which are found to be operating in violation of the terms of the said Act.

Eighth: Paragraph (i) of said Act in substance provides that a hotel owner may bring an action in the district court to prohibit transient rentals in an FHA insured project if such rentals are in violation of section 513 of the Act. However, the authority of such hotel owner to bring such action against the 608 projects is limited, we submit, to only such projects as could affect the income of such hotels. This, we believe, is shown by the fact that hotel owners beyond a radius of fifty miles from a section 608 project could not bring such action even if the whole building were being operated completely as a hotel catering exclusively to transient guests. We assert that paragraph (i) shows that the real purpose of section 513 of the Housing Act of 1954 was to protect the profit of hotels—not to protect the rights of the public at large.

Ninth: Paragraph (j) simply gives the district courts jurisdiction of actions brought under section 513.

The Act speaks for itself, but we repeat—nowhere in the Act can there be found any provision or any wording that could be made use of to prohibit the rental of some of the apartments in a project, the mortgage on which was insured prior to the effective date of the Housing Act of 1954, for less than thirty days.

IV. Section 513 of the Housing Act of 1954 was enacted for the private benefit of members of the American Hotel Association. This is not a valid public purpose

The Court below, although it rested its opinion on other grounds, intimated that if necessary it would have found section 513 void on the ground here argued. It said (R. 116):

"* * * Even if it could be successfully argued that plaintiff had no vested right to lease an apartment for a period of less than thirty (30) days, the effect of the Housing Act of 1954 undoubtedly attempts to create a new obligation with respect to a past transaction and hence must fail. 16 C.J.S., 'Constitutional Law', Sec. 417, p. 861. To open an avenue for retroactive or retrospective laws in the field of contract not dealing with police, war, or emergent powers, would have a very serious effect in the commercial world which has become so involved with government financing and other related subjects. In substance, there must be a stopping point somewhere, and this appears to illustrate the dangers involved where Congress has yielded to the requests of a third party with knowledge that there will be a financial loss to the mortgagor and, to a limited extent, the taxpayers."

This Court has recently held:

"When it appears that an Act of Congress conflicts with one of these provisions [Constitution], we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation". *Trop* v. *Dulles*, 356 U.S. 86, 104.

We have demonstrated above that Appellee is not operating its apartment building for hotel or transient purposes; that its transient rentals, which never interfere with long term rentals, require only about 10% of its apartments and that such rentals are incidental to its primary and principal business of operating a rental housing project. Such rentals were not only plainly permissible under the applicable statutes and the applicable rules and regulations thereunder,

but are equally plainly within the fair intendment of Appellee's charter. Since Section 513(a) of the Housing Act of 1954 does no more than declare a congressional intent excluding use of projects insured under the National Housing Act "for transient or hotel purposes" and Section 513(b) does not purport to do more than prohibit operation "for transient or hotel purposes", it would seem almost too obvious for argument that the transient rentals of Appellee disclosed by this record and permitted by the court below are not within the prohibitions of Section 513(b) of the Housing Act of 1954, and that the judgment of the court below, permitting Appellee to rent a reasonable number of its apartment units transiently, is plainly right. Since, however, the whole basis of Appellant's argument is the mistaken assumption that Section 513 applies to these transient rentals by Appellee which, as shown, are negligible in number and proportion and are vital to Appellee's solvency, and since a judgment which is right should be affirmed, we shall now proceed to show that even if section 513 of the Housing Act of 1954 were applicable, it could not be enforced against Appellee because not enacted for a public purpose. In so doing, we shall show not only that section 513 was enacted at the insistence of and for the benefit of the American Hotel Association, but also that it operates to provide special privileges for the private benefit of project operators in the State of Florida.

A. Congress Can Act Only in Furtherance of Some Valid Public Purpose

We start from these premises:

1. Congress may legislate only with respect to those powers which the Constitution confers upon the Federal Government either in express terms or by necessary impli-

cation. *Constitution*, Article I, Section 8. This Court has declared:

> "The ruling and firmly established principle is that the powers which the general government may exercise are only those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. * * *" *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291.

2. Congress may not act arbitrarily, the Due Process clause of the Fifth Amendment being a restraint similar to that imposed on state legislatures by the Equal Protection clause of the Fourteenth Amend ent. *Constitution*, Amendments V, XIV; *Perez* v. *Brownell*, 356 U.S. 44; *Bolling* v. *Sharpe*, 347 U.S. 497. As this Court said in *Perez* v. *Brownell* (356 U.S. 44, 58):

> "Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution."

3. The "General Welfare" provision of the first clause of Article I, Section 8 of the Constitution does not empower Congress to legislate substantively for the "general welfare" but merely to appropriate money for the general welfare. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 291-292, supra; *United States* v. *Butler*, 297 U.S. 1, 64.

This proposition is forcefully set forth in *Carter* v. *Carter Coal Co.* (298 U.S. 238, 291) in this language:

> "The proposition, often advanced and as often discredited, that the power of the federal government

> inherently extends to purposes affecting the Nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court."

From these premises we draw the inescapable conclusion that Congress may not constitutionally legislate except in furtherance of some valid public purpose—or, stated conversely, that an Act which does not serve a valid public purpose is void.

Although the decision in *United States* v. *Butler*, 297 U.S. 1, supra, was by a divided court, the division was not on Constitutional principles, but only on the application of those principles to the legislation then under attack, and the Court was unanimous in its construction of the General Welfare clause (*United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 738). It is therefore appropriate that we quote from the dissent by Mr. Justice Stone, when with his usual felicity of language he phrased our proposition thus (297 U.S. 1, 83):

> "The Constitution requires that public funds be spent for a defined purpose, the promotion of the general welfare."

We reiterate—the general welfare—not the welfare of the members of some particular private commercial association.

This Court has recently declared that even a Congressional investigation must be for a public purpose. In the recent case of *Watkins* v. *United States*, 354 U.S. 178, involving the refusal of a witness before a committee of Congress to answer certain questions, the Court stated:

"The petitioner has earnestly suggested that the difficult questions of protecting these rights [Constitutional] from infringement by legislative inquiries can be surmounted in this case because there was no public purpose served in his interrogation." (354 U.S. 178, 199.)

This Court held:

"No inquiry is an end in itself; it must be related to, and in furtherance of a legitimate task of Congress." (p. 187)

"While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law making. It is justified solely as an adjunct to the legislative process." (p. 197)

"* * * an investigation into individual affairs is invalid if unrelated to any legislative purpose." (p. 198)

"Their [the committee members'] motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." (p. 200)

"No doubt every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our government but such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms." (p. 204)

It seems clear that "legislative purpose" is synonymous with "public purpose". This is tantamount to a formal declaration that an Act of Congress must serve a valid public purpose.

B. Section 513 of The Housing Act of 1954 Is Special-Interest Legislation, Not Promotive of the General Welfare and Serving No Public Purpose

We turn now to the history and construction of section 513 of the Housing Act of 1954.

1. *Section 513 was enacted at the insistence of the American Hotel Association, for the specific purpose of protecting the profits of the members of that association, and in substantially the same form as the draft prepared by the association.*

In the spring of 1954, representatives[4] of the American Hotel Association appeared before the appropriate Committees of both Houses of Congress to urge the enactment of legislation that would protect the profits of the members of their association. The testimony of these representatives discloses not only that they were actuated solely by selfish motives, but also that they tried to give the false impression that Veterans Emergency Housing projects had been constructed with appropriated funds. In truth, of course, they were financed and constructed exclusively with private capital and no public funds used.[5]

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[4] Mr. Earl M. Johnson, Treasurer of the American Hotel Association, testified before the House Committee (Hearing before the Committee on Banking and Currency, House of Representatives, 83d Cong., 2d Sess., on H.R. 7839, pp. 507-515), and Mr. Arthur J. Packard, Chairman of the Board of the American Hotel Association, testified before the Senate Committee. Mr. Packard's testimony is reproduced in the record (Senate Hearings, Part 1, pp. 654-661; Pl. Ex. 27; R. 44, 195-206). Mr. Johnson's testimony is to the same effect and often in identical language. The testimony of Mr. Johnson and Mr. Packard is compelling that they were not interested in the general welfare—they were interested in the special welfare of the members of their association and in the enhanced profits they expected to result from stifling competition.

[5] See Senator Sparkman's reminder that the Veterans Emergency Housing Program "* * * provided the housing at a time when no other device could have succeeded, and which did it without using 1 cent of Government money." (100 Cong. Rec. 11,883; Pl. Ex. 30; R. 44, 225).

That these projects were government-induced and government-promoted is unquestionably true, but it is a serious abuse of language to characterize them as "government-assisted" or "government-financed". As Congressman Spence stated on the floor of the House on August 25, 1949 in reference to the Veterans Emergency Housing Program (95 Cong. Rec. 12, 287):

> "Mr. Speaker, this is not a gratuity we are giving to those who are insured. Loans are insured as the result of the payment of a premium of one-half of one per cent. That premium has not only been enough to pay the liabilities but has been enough to amass a reserve of $50,000,000 in the last year."

The Federal Housing Administration's twenty-third annual report, for the year ending December 31, 1956 (the latest available to Appellee) speaks for itself. The War Housing Insurance Fund (under which Appellee's mortgage was insured) is discussed on page 126 of that report in these words:

> "During the fiscal year 1956 the fund earned $27,369,485 and had expenses and losses of $16,433,934, leaving $10,935,551 net income before adjustment of valuation reserves. After the valuation reserves had been increased by $4,471,032, the net income for the year amounted to $6,464,519, which was credited to the insurance reserve fund.
>
> "Cumulative income of the War Housing Insurance Fund from its establishment March 28, 1941, to June 30, 1956, amounted to $229,559,367, while cumulative expenses were $98,492,367, leaving $201,067,403 net income before adjustment of reserves. Valuation reserves of $66,489,673 were established, leaving cumulative net income of $134,577,730."

Furthermore, since this is not a mutual fund (op. cit., p. 125), all these profits inure to the Treasury of the United States.[6] Appellee's initial investment of well over $300,000 (R. 103) (which is exclusive of buildings valued at some $70,000 which were torn down to make room for it, R. 3) plus payments to principal of over $80,000 (R, 5) is certainly a substantial investment and just as much the private personal risk capital of Appellee's stockholders as the investment of any hotel owner would ever be.

At this point we invite attention to the unusual provisions of section 513 (i) of the Housing Act of 1954[7], which provides in substance for private enforcement by hotel owners and operators and hotel groups and associations. Such right of enforcement is, however, specifically conditioned upon the complaining hotel being located within a 50-mile radius of an FHA-insured project which is being operated "for hotel or transient purposes."

Motels, like hotels, are conventionally financed. Their business, like hotels, is rental to transients. Yet motel operators are denied the privilege afforded by section 513 (i). Why this curious discrimination in the Act? Do hotels have greater Constitutional rights than motels? That section 513 does not and was never intended to serve any public purpose is highlighted by this subsection (i).

We believe the complete lack of any public purpose in section 513 can be illustrated by reversing the issues in this case. Suppose the Association of Section 608 Owners should appear before the Committees of Congress asking legislation to prohibit hotels from accepting relatively permanent guests (i.e., rental to the same person for more than thirty days at a time), on the ground that such accept-

---

[6] Appellee had contributed insurance premiums of $21,598.78 when this action was commenced, March 10, 1955 (R. 5).

[7] The full text of section 513(i) is set forth in Appendix A hereto, p. 89.

ance of relatively permanent guests constituted unfair competition. Would an act passed in response to such request serve any public purpose? Would such an act comply with the Due Process clause? We believe that by asking the question, we have answered it.

2. *Section 513 arbitrarily and unreasonably discriminates against Appellee.*

Section 513 (a) contains a statement of congressional intent; section 513 (c) relates solely to mortgages insured on or after the effective date of the Housing Act of 1954; section 513 (d) directs the Commissioner to enforce the section; section 513 (e) defines "rental for transient or hotel purposes" and "multifamily housing"; sections 513 (f), (g) and (h) authorize litigation by the Commissioner; section 513 (i) was discussed above; and section 513 (j) confers jurisdiction on the district courts. Only section 513 (b), however, purports to prohibit "operation for transient or hotel purposes" in existing housing, and even section 513 (b) does not purport to apply to projects insured prior to its enactment. It reads as follows:

> "(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that

prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis)."

We shall now proceed to analyze the two exemptions in this section and to demonstrate that their effect is so arbitrary, unreasonable and discriminatory as to preclude the enforcement of section 513(b) against Appellee, even if Appellee's project were subject to the terms of that section and even if Appellee's incidental transient rentals of less than ten percent of its apartment units constituted "operation for transient or hotel purposes".

Prior to March 28, 1954, approvals for transient rentals were given when:

> "* * * it appeared to be in the public interest, in the interest of the Government's financial interests, and in the interest of the community in which the structure existed in which there was no demand for apartment rentals * * *". (Testimony of Appellant's witness, Adolphus M. Prothro, R. 92.)

The quoted language could not more perfectly describe Appellee's situation had it been fashioned expressly for that purpose. But the result of the first exemption in section 513(b) is an arbitrary and unreasonable discrimination between Appellee, on the one hand, and on the other hand, those other mortgagor corporations in like situation with Appellee, but which had unnecessarily secured the Federal Housing Administration's paternalistic blessing of their transient rentals prior to the 1954 Act.

But this discrimination favoring projects which had secured an approval they did not need, objectionable as

it is, is less gross than that imposed by the resort area exemption. We know from the debates in Congress that this exempts the whole State of Florida (Colloquy between Senator Smathers and Senator Capehart, July 28, 1954, 100 Cong. Rec. 11,883, supra p. 50), and no regulations defining "resort area" so as to include any place outside Florida have been codified in the current pocket part to the 1949 edition of Title 24 of the Code of Federal Regulations. We must therefore conclude that "resort area" means the whole State of Florida and nowhere else.

The resort area exemption, unlike the first exemption, does not even require that the project have secured approval from the Federal Housing Administration prior to May 28, 1954 to come within it. All that is necessary is that the project be somewhere in Florida and have rented transiently prior to March 28, 1954. If prior to that magic date (over two months before section 513 was enacted), the project had rented every single one of its units transiently to the exclusion of priority tenants, as called for by section 608, it may continue so to do. Quite aside from any considerations of whether the Charleston area could qualify as a "resort area" under appropriate regulations, we are wholly unable to perceive the justice, the logic, or the legal basis for denying to Appellee the right to continue to rent transiently those few apartment units which mean the difference between solvency and bankruptcy, simply because Charleston is not located in Florida.

We venture to suggest that never before or since has Congress enacted legislation which has one effect in one state, and a precisely opposite effect in all the rest. This is indeed that "gross discrimination" which is "equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585.

This is not a case where the infirmity can be cured by striking the offending provision and leaving the rest complete. First, the Act contains no severability clause. *Lynch* v. *United States*, 292 U.S. 571, 586-587; *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241. Second, and even more important, if the exceptions are stricken from section 513(b), what is left is not what Congress wrote nor what Congress intended. This Court will not so rewrite a statute. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330, 361-362:

> "* * * The statute contains a section broadly declaring the intent that invalid provisions shall not operate to destroy the law as a whole. Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command. Dorchy v. Kansas, 264 U.S. 286. It has the effect of reversing the presumption which would otherwise be indulged, of an intent that, unless the act operates as an entirety, it shall be wholly ineffective. Williams v. Standard Oil Co., 278 U.S. 235, 242; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 184. But, notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole. * * *"

Conclusion

In conclusion we respectfully submit:

1. That the language of Section 513 of the Housing Act of 1954 specifically excludes Appellee's project;

2. That the prohibitions of Section 513 against "operation for hotel or transient purposes" do not apply to Appellee's incidental rentals for less than thirty days, which rentals are necessary to Appellee's solvency;

3. That retroactive application of Section 513 against Appellee would divest Appellee of its rights without due process of law;

4. That Section 513 is wholly void because enacted for a private not a public purpose; and

5. The judgment of the Court below holding that Appellee

> "has the right to lease a reasonable number of apartments in its apartment building in Charleston, South Carolina, known as The Darlington, for terms of less than thirty days, and that the defendant and its Commissioner have no right to prohibit such rental of a reasonable number of apartments in said apartment building for periods of less than thirty days, provided that any veteran of World War II, his immediate family, or any other proper person desiring occupancy for a period of thirty days or more is not thereby precluded from obtaining unfurnished accommodations for terms of thirty days or more, and provided further that no such applicant shall be required to subscribe to any service or incidental which may be offered,"

is plainly right and should be affirmed.

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APPENDIX A

The pertinent parts of the Housing Act of 1954, Public Law 560, 83d Congress, Chapter 649, 2d Session, H.R. 7839, 12 U.S.C.A. Section 1731b reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'Housing Act of 1954.'

"Sec. 513. (a) The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding.

"(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multi-family housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis).

"(c) Notwithstanding any other provisions of this Act, no mortgage with respect to multifamily housing shall be insured under this Act (except pursuant to a commitment to insure issued prior to the effective date of the Housing Act of 1954), and (except as to housing coming within the provisions of clause (1) or clause (2) of the preceding subsection) no mortgage with respect to multifamily housing shall be insured for an additional term, unless (1) the mortgagor certifies under oath that while such insurance remains outstanding he will not rent, or permit the rental of, such housing or any part thereof for transient or hotel purposes, and (2) the Commissioner has entered into such contract with, or purchased such stock of, the mortgagor as the Commissioner deems necessary to enable him to prevent or terminate any use of such property or project for transient or hotel purposes while the mortgage insurance remains outstanding.

"(d) The Commissioner is hereby authorized and directed to enforce the provisions of this section 513 by all appropriate means at his disposal, as to all existing multifamily housing, with respect to which a mortgage was insured under this Act prior to the effective date of the Housing Act of 1954 as well as to all multifamily housing with respect to which a mortgage is hereafter insured under this Act: *Provided*, That no criminal penalty shall, by reason of enactment of this section, be applicable to the rental or operation of any such existing multifamily housing in violation of any provision of subsection (b) of this section at any time prior to the effective date of the Housing Act of 1954.

"(e) As used in this section, (1) the term 'rental for transient or hotel purposes' shall have such meaning as prescribed by the Commissioner but rental for

any period less than thirty days shall in any event constitute rental for such purposes, and (2) the term 'multifamily housing' shall mean (i) a property held by a mortgagor upon which there are located five or more single family dwellings, or upon which there is located a two-, three-, or four-family dwelling, or (ii) a property or project covered by mortgage insured or to be insured under section 207, under section 213 with respect to any property or project of a corporation or trust of the character described in paragraph numbered (1) of subsection (a) thereof, under section 220 if the mortgage is within the provisions of paragraph (3)(B) of subsection (d) thereof, under section 221 if the mortgage is within the provisions of paragraph (3) of subsection (d) thereof, under section 608, under section 803, or under section 908, or (iii) a project with respect to which an insurance contract pursuant to title VII is outstanding.

"(f) Promptly after receipt of written notice that any portion of any building is being rented or operated in violation of any provision of this section or of any rule or regulation lawfully issued thereunder, the Commissioner shall investigate the existence of the facts alleged in the written notice and shall order such violation, if found to exist, to cease forthwith.

"(g) If such violation does not cease in accordance with such order, the Commissioner shall forward the complaint to the Attorney General of the United States for prosecution of such civil or criminal action, if any, which the Attorney General may find to be involved in such violation.

"(h) Whenever he finds a violation of any provision of this section has occurred or is about to occur, the Attorney General shall petition the district court

of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and upon a showing by the Attorney General that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted without bond.

"(i) Any person owning or operating a hotel within a radius of fifty miles of a place where a violation of any provision of this section has occurred or is about to occur, or any group or association of hotel owners or operators within said fifty-mile radius, at his or their sole charge or cost, may petition any district court of the United States or the district court of any Territory or other place subject to United States jurisdiction within whose jurisdictional limits the person doing or committing the acts or practices constituting the alleged violation of this section shall be found, for an order enjoining such acts or practices, and, upon a showing that such acts or practices constituting such violation have been engaged in or are about to be engaged in, a permanent or temporary injunction, restraining order, or other order, with or without such injunction or restraining order, shall be granted.

"(j) The several district courts of the United States and the several district courts of the Territories of the United States or other place subject to United States jurisdiction, within whose jurisdictional limits

the person doing or committing the acts or practices constituting the alleged violation shall be found, shall, wheresoever such acts or practices may have been done or committed, have full power and jurisdiction to hear, try, and determine such matter under subsections (h) and (i) of this section."

(2070-1)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

v.

THE DARLINGTON, INC.,
Appellee,

EX PARTE: THE DARLINGTON, INC.,
Petitioner.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 13

FEDERAL HOUSING ADMINISTRATION,
Appellant,

v.

THE DARLINGTON, INC.,
Appellee,

EX PARTE: THE DARLINGTON, INC.,
Petitioner.

PETITION FOR REHEARING

The Darlington, Inc., Petitioner above-named, respectfully petitions for a rehearing upon the following grounds:

FIRST

The Court has created a brand-new field subject to direct Congressional legislative regulation, and has placed the operations of The Darlington, Inc., therein.

The majority opinion, we respectfully submit, erroneously holds that The Darlington, Inc., the appellee housing corporation, is subject to continuing subsequent Federal legislation, asserting as authority for such holding, and we quote:

"As stated in *Fleming* v. *Rhodes*, 331 U. S. 100, 107, 'Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts.'

"• • • Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

The majority opinion correctly asserts that:

"Appellee is a South Carolina corporation formed in 1949 to obtain FHA mortgage insurance for an apartment house to be constructed in Charleston. The insurance issued and the apartment was completed."

The appellee petitioner herein recognizes that those who do business in certain fields over which the Constitution has expressly given Congress control, do so subject to the continuing subsequent legislative powers of the Federal government to govern and control such businesses or activities. Examples include the war power under which *Fleming* v. *Rhodes*, *supra*, was decided, the commerce clause, the general welfare clause, the monetary clause, etc., of the Constitution. However, neither the facts in the instant case nor the determination of any issue in the case are in any way involved in or remotely concerned with any of these paramount constitutional legislative powers of Congress.

The effect of the majority opinion is, therefore, to hold for

the first time in the history of this Court that a private corporation, chartered by a State, not engaged in interstate commerce, or in any other business or activity under a constitutional grant of any license, franchise or privilege by the Federal government, is nevertheless subject to continuing subsequent legislative control by the Federal government without the protection afforded by the Due Process Clause of the Constitution.

The majority opinion thereby creates a new legislative "regulated field"—namely, the private housing industry—a commercial area which is completely outside the purview of any of the paramount constitutional powers of Congress which permit subsequent legislation affecting previously acquired rights.

The Darlington, Inc., a South Carolina corporation engaged only in intra-state activity, is immune in the operation of its property from any subsequent control of its operations by any act of Congress until it is shown that the general welfare or war power of the country is involved. There is no suggestion of such power being involved in the present case. Therefore, to apply the subsequent legislative provisions of a Federal statute to its operations, as the majority opinion asserts, is an unheard of, revolutionary innovation in judicial interpretation, placing the approximately 7,000 Section 608 project owners (R. 96) and the holders of the insured mortgages over such projects, with investments running in excess of Three Billion Four Hundred Millions of Dollars (FHA, 23rd Annual Report, Table III–7, p. 21), in the chaotic position of never knowing from day to day when subsequent legislation may be passed affecting their contractual or property rights, a result which we do not believe the majority of the Court intended.

SECOND

The Court has conferred upon the Federal Housing Com-

missioner regulatory powers which were neither conferred nor intended to be conferred by Congress.

The majority opinion, we respectfully submit, erroneously asserts that the operations of The Darlington, Inc., are in a "regulated field," subject and amenable to the continuing subsequent regulations of the Federal Housing Commissioner, the language of the opinion being:

> "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

The majority opinion, therefore, confers on the Federal Housing Commissioner subsequent regulatory functions not conferred or intended, but in fact specifically prohibited by the very statute under consideration—Section 608 of the National Housing Act. It is true that Section 607 of the Housing Act provides:

> "Sec. 607. The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this title."

However, Section 608 specifically prohibits the control of the operation of a project insured under the terms of that Act through subsequent regulations of the Federal Housing Commissioner, and specifically provides and limits the manner in which the Federal Housing Commissioner may control the operation of a corporation insured under Section 608. The Act provides (Sec. 608(b) (1)):

> "(1) The mortgaged property shall be held by a mortgagor approved by the Commissioner. The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire

for not to exceed $100 stock or interest in any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation."

Pursuant to the terms of the Act above set forth, authorizing the Federal Housing Commissioner in his discretion to control the manner of the operations of a 608 insured project such as The Darlington, Inc., the Federal Housing Commissioner promulgated the following rule (24 C. F. R. 280.29):

"Section 280.29. *Regulation of mortgagor by Commissioner in general.* A corporate mortgagor shall be regulated through the ownership by the Commissioner of certain shares of special stock (or other evidence of beneficial interest in the mortgagor) which stock or interest will acquire majority voting rights in the event of default under the mortgage or violation of provisions of the charter of the mortgagor or the violation of any valid agreement entered into between the mortgagor, the mortgagee and/or the Commissioner, but only for a period coextensive with the duration of such default or violation.

Such regulation and the additional regulation or restriction provided in Sections 280.30 to 280.32, inclusive, shall be made effective by incorporation of appropriate provisions therefor in the charter or other instrument under which the mortgagor is created, or by agreement. In all cases where the insured mortgage is in excess of $200,000, the mortgagor must be a corporation or trust."

Reference to the charter of the corporation (Pl. Ex. 19; R. 184) will show that the only control that could be exercised by the Federal Housing Commissioner over the corporation was limited to the occurrence of a default by the corporation as listed in the charter. In such event the Federal Housing Com-

missioner, in his capacity as preferred stockholder and not otherwise, was authorized to take over the operation of the corporation by the election of directors of the choice of the Federal Housing Commissioner as preferred stockholder, Article Fifth (e) of the charter reading (Pl. Ex. 19; R. 186):

> "(e) In the event of any default by the corporation, as hereinafter defined, and during the period of such default, the holders of the Preferred Stock voting as a class, shall be entitled to remove all existing directors of the corporation, and to elect new directors in their stead***."

Article Seventh (a) of the charter lists the happenings constituting a default, the said Article Seventh (a) reading (Pl. Ex. 19; R. 187-188):

> "Seventh: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: (1) the failure of the corporation to have dismissed within thirty days after commencement, any receivership, bankruptcy or other form of liquidation instituted by or against the corporation; (2) the failure of the corporation to pay the principal, interest, or any other payment due on any note, bond or other obligation executed by it, as called for by the terms of such instruments; (3) the failure of the corporation to establish and maintain the reserve fund for replacements provided for in Article Fifth, Section (d) hereof or the use of such fund except as permitted in said section; (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this certificate, the by-laws of the corporation, the mortgage, or any contract to which the corporation and the Commissioner shall be parties, or fail to

> carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated."

We respectfully submit that as shown by the specific wording of Section 608 of the National Housing Act and the rules and regulations of the Federal Housing Commissioner, Congress has specifically prohibited the Federal Housing Commissioner from imposing any subsequent control of a corporation operating a Section 608 housing project through the medium of subsequent regulations, and has specifically limited any control over such corporations exclusively to such control as the Commissioner may have seen fit to impose through charter provisions.

We submit that the statute law having provided one way—and one way only—for the control of the operation of a Section 608 housing project such as The Darlington, Inc., namely through the ownership of preferred stock in such corporation, the mandate of the statute could not be circumvented by regulations of the Commissioner or otherwise, for as this Court has consistently held from its earliest decisions, whenever a statute limits a thing to be done in a particular way, that way and no other must be followed to accomplish the objective:

> "***for when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh and Gaston RR. Co.*, v. *John A. Reid, Sheriff*, etc., 13 Wall., 269, 270.

See also *Arthur* v. *Cumming*, 91 U. S. 362, 364.

It is further respectfully submitted that the majority opinion, in holding that corporations such as The Darlington, Inc., were in a "regulated field" and amenable to subsequent regulations, could not have fully appreciated the statutory requirements that if control of such corporations was to be effected, the

same was to be effected only through charter provisions, and certainly the charter did not provide for any subsequent control of the corporation through regulations of the Federal Housing Commissioner but, as stated, subsequent control was limited to the Commissioner, as preferred stockholder, taking over the operation of such corporations if a default occurred in the charter provisions.

We also respectfully submit that Congress was fully cognizant of its lack of authority to subject a private corporation, engaged in a purely intra-state business, to regulation by a Federal agency; and that Congress was also cognizant of the fact that the Federal Housing Commissioner was not constituted as a regulatory body, and that the only means by which the Federal Housing Commissioner could effect any regulation of or exercise any control over such corporation was by charter provisions coupled with stock ownership in the corporation. This was, therefore, the reason for the provisions in the Act for the Commissioner's ownership of special stock or interest in the mortgagor corporation, and we respectfully submit that the majority opinion overlooks these facts and in effect grants to the Federal Housing Commissioner regulatory powers which Congress never intended that he have.

THIRD

The Court has subjected The Darlington, Inc., to arbitrary regulation by the Federal Housing Commmissioner, without any of the safeguards of administrative due process.

Should the majority of this Court, regardless of what is shown in the First and Second Grounds above, continue to be of the opinion that those who deal with the Federal Housing Commissioner are operating in a regulated field and are there-

fore amenable to subsequent legislation and regulation, we submit that such holding will for the first time in the history of the United States subject the purely intra-state operations of a State-chartered private corporation to continuing subsequent Federal legislation and regulation. Until this decision, such Federal regulation of purely intra-state business operations has always been held to be beyond any Congressional power except in time of war. As was said by this Court in *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 548:

> "If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."

Furthermore, to subject The Darlington, Inc., to future regulation by the Federal Housing Administration would be completely unprecedented and would amount to depriving The Darlington, Inc., of its property without due process of law. The Federal Housing Administration, unlike a regulatory agency, does not consist of a commission or a board, but of a single executive head: namely, the Commissioner—yet, as the majority holds, he is empowered to make subsequent rules and regulations affecting the property rights of those who do business with him without affording to them any of the fundamental constitutional safeguards of administrative due process: namely, notice, an opportunity to be heard, and an opportunity for judicial review.

We cannot believe that the majority of this Court intended

to subject those who do business with the Federal Housing Commissioner to his unrestricted whims. Such a situation would produce results literally comparable with those which Mr. Justice Douglas deplored in his dissenting opinion in *United States* v. *Wunderlich*, 342 U. S. 98, 101, wherein he stated:

> "But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected."

FOURTH

The Court has misconstrued the present authority of the Federal Housing Commissioner to approve transient rentals under Section 513 (b) of the 1954 Housing Act.

We submit that the majority opinion erroneously asserts that whenever the public interest requires it, the Federal Housing Commissioner is now authorized under the express terms of the 1954 Act, Section 513 (b), to permit transient rentals in any FHA-insured Section 608 housing project such as The Darlington, Inc., the majority opinion reading:

> "It is true that FHA felt it had the authority to approve rental schedules for transients. It gave such approval in a dozen or more instances where it felt the public interest required it. We need not stop to inquire whether FHA had that authority.[8]
>
> • • • • •
>
> "[8]The 1954 Amendment expressly gave FHA that power in Section 513 (b)."

We respectfully submit that Section 513 (b), as will be shown from a reading of the same, far from authorizing the Federal Housing Commissioner to approve transient rentals, in fact prohibits him from now approving any transient rentals, even though the public interest requires such approval, unless (a) there was already in existence prior to the 1954 Act a written agreement between the Commissioner and an apartment owner in which the Commissioner agreed to such transient rentals or (b) the transient rentals occurred prior to the 1954 Act in an area which the Commissioner now determines to be a resort area. Section 513 (b) reads:

> "(b) Notwithstanding any other provisions of this Act, no new, existing, or rehabilitated multifamily housing with respect to which a mortgage is insured under this Act shall be operated for transient or hotel purposes unless (1) on or before May 28, 1954, the Commissioner has agreed in writing to the rental of all or a portion of the accommodations in the project for transient or hotel purposes (in which case no accommodations in excess of the number so agreed to by the Commissioner shall be rented on such basis), or (2) the project covered by the insured mortgage is located in an area which the Commissioner determines to be a resort area, and the Commissioner finds that prior to May 28, 1954, a portion of the accommodations in the project had been made available for rent for transient or hotel purposes (in which case no accommodations in excess of the number which had been made available for such use shall be rented on such basis)."

Although the above-quoted Section 513 (b) ratifies and confirms those transient rentals agreed to in writing by the Commissioner on or before May 28, 1954, it prohibits him from making such agreements after that date. The only dis-

cretion left to the Commissioner by Section 513 (b), with reference to transient rentals, is the discretion granted him to determine what constitutes a "resort area."

This interpretation is confirmed by the testimony of the Director of the Legal Division of the Federal Housing Administration, Adolphus M. Prothro, who, in answer to questions by the Government's trial counsel in this case, stated that although at one time the Commissioner felt that he "could waive the charter provision and permit on such terms as he prescribed a transient operation" (R. 96), the Commissioner interpreted the 1954 Act as changing the intent of Congress and precluding any transient rentals (R. 98).

Mr. Prothro's exact testimony is here set out:

> "Q. As I understand your testimony, FHA at one time at least took the position that the Commissioner since he was authorized to regulate the method of operation of the apartments could waive the charter provision and permit on such terms as he prescribed a transient operation; is that correct? A. That is correct. That was the official position taken." (R. 96)
>
> "Q. After the passage of the 1954 Act was there a change in the opinion of the FHA as to whether under the term 'methods of operation' they could in their discretion upon application permit transient rentals? A. There was a *definite change in our interpretation of the intent of Congress* from that time forward because we now felt that there was no discretionary authority in FHA to approve transient rentals." (R. 98; emphasis added.)

Although the majority of the Court seems to be under the impression that The Darlington, Inc., has some unspecified administrative remedy whereby foreclosure can be avoided,

it is admitted that no agreement for transient rentals existed between The Darlington, Inc., and the Commissioner prior to May 28, 1954, and there is no way of knowing whether the Commissioner would determine Charleston to be a resort area. Therefore, since the Commissioner does not have the authority which the majority attributes to him, to approve transient rentals, the majority opinion results in a construction that leads to injustice and oppression and produces absurd consequences, for it is admitted that without the revenue derived from transient rentals The Darlington, Inc., will be unable to meet the payments called for by its insured mortgage and foreclosure will inevitably follow, with resultant substantial loss to the Government (R. 114).

This Court has heretofore consistently rejected statutory interpretations that lead to such unjust results.

In *United States* v. *Kirby*, 7 Wall. 482, this Court, in construing an act of Congress, held:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter."

Again, in *Oates* v. *First National Bank of Montgomery*, 100 U. S. 239, this Court said:

> "****and we should discard any construction that would lead to absurd consequences."

This rule was thus reiterated in *Burnet* v. *Guggenheim*, 288 U. S. 280, 285:

> "A statute will be construed in such a way as to avoid unnecessary hardship when its meaning is uncertain."

Believing as we do that the majority opinion has erroneously construed Section 513 (b) of the Housing Act of 1954 as permitting the Commissioner to approve transient rentals in Section 608-insured projects whenever he deems that the public interest justifies such transient rentals, whereas in fact Section 513 (b) prohibits the Commissioner from approving any such transient rentals even though in his judgment such approval of transient rentals is demanded by the public interest, we cannot believe that the result of the majority's opinion, namely, the destruction of The Darlington, Inc., and other corporations similarly situated, with the resulting substantial loss to the Government, was intended or desired by the majority. Such construction would lead to oppressive and absurd consequences and would produce unnecessary hardships and injustice, all of which constructions this Court has consistently avoided.

FIFTH

The Court has overlooked controlling evidence of the prior administrative interpretation of Section 608 with respect to transient rentals.

It is respectfully submitted that the following assertions in the majority opinion are erroneous:

> "The contemporaenous construction of the Act by the agency entrusted with its administration is squarely to the contrary.' [I.e., is against transient rentals].****** When Congress passed the 1954 Amendment, it accepted the construction of the prior Act which bars rentals to transients."

The majority opinion cites a letter from the Washington office of the Federal Housing Administration to the field offices dated August 10, 1951 (Def. Ex. 10; R. 247, 250), as sustaining the conclusions that the Federal Housing Adminis-

tration had contemporaneously construed Section 608 of the Housing Act as prohibiting transient rentals, the Court in its opinion stating as follows:

> "In a letter to field offices in 1951 explaining the criteria to be considered in passing on rent schedules and methods of operation, the FHA instructed them to: ' . . . bear in mind that the objective of this Administration is the production of housing designed for the (sic) occupaney of a relatively permanent nature and that transient occupancy is contrary to policy. No approval will be granted with respect to a proposal anticipating transient occupancy.' "

We respectfully call to the Court's attention that as the record discloses, and the majority opinion asserts, the mortgage in this case was insured in 1949. The letter relied upon by the Court was therefore not a contemporaenous construction by FHA but came approximately two years after the respective rights of The Darlington, Inc., and the Federal Housing Commissioner had been fixed by charter and stock issue, and the letter referred to by the majority opinion as a contemporaneous construction was not, in fact, even written until more than a year after the expiration of Section 608 on March 1, 1950. We quote from Note 2, page 4 of the Appellant's Brief:

> "[2]The authority to insure mortgages under Section 608 has been withdrawn as to all applications received after March 1, 1950, 63 Stat. 905, 64 Stat. 57."

We further respectfully submit that the only evidence of a *contemporaneous* construction by the Commissioner in reference to his rights relating to transient rentals in a Section 608 project, contained within the record of this case, is to be found in the testimony of Mr. Arthur J. Packard, President of the American Hotel Association, before the Committee on

Banking and Currency of the United States Senate, and from the testimony in this case of Mr. Adolphus M. Prothro, Director of the Legal Division of the Federal Housing Administration. We quote from the testimony of the President of the American Hotel Association before the Committee on Banking and Currency (Pl. Ex. 27; R. 195, 198):

> "As I mentioned before, we have tried for 4 or 5 years to achieve an administrative solution to this problem. Officials of FHA have generally been quite sympathetic. Section 1743 (b) (1), in connection with section 608 properties, gave the Administrator authority to regulate rents, charges, and methods of operation. But counsel for the FHA has viewed narrowly this authorization. *He contends that it does not confer power upon the agency to impose regulations after the eligibility of the mortgagor has been approved.* At the outset, the agency always required approval of all rent schedules, and these were normally expressed in monthly rentals. *But FHA counsel now takes the position that if one of these apartment buildings rents a room overnight for not more than one-thirtieth of the approved monthly rental, the agency has no basis for prohibiting the operator from maintaining such practice.*" (Emphasis added.)

It is significant to note that prior to the 1954 Act it was the settled and matured view of the Commissioner's own legal advisers that the Commissioner's authority to regulate "rents, charges, and methods of operation" did *not* confer upon the Commissioner any power to impose regulations upon a mortgagor corporation "after the eligibility of the mortgagor has been approved;" i.e., after the Commissioner has issued his endorsement insuring the mortgage. This is precisely the view of the petitioner, The Darlington, Inc., and the reason The Darlington, Inc., felt that it did not have to ask the

Commissioner to approve its transient rentals.

We now quote from the testimony of the Director of the Legal Division of the Federal Housing Administration in reference to his interpretation as to whether Section 608 of the Housing Act prohibited transient rentals (R. 92):

> "Q. In connection with your interpretation here that the Act prohibits any transient rentals, even prior to the '54 amendment, is it or is it not a fact that the Federal Housing Administration office in Washington assisted a 608 owner in having his apartment house designated a hotel to comply with the District zoning law? A. I will answer that this way: *My affidavit does not say that the statute prohibited transient rentals.*" (Emphasis added.)

We submit that the record in this case is conclusive of the fact that prior to the 1954 Housing Act the Federal Housing Commissioner not only had never interpreted or construed Section 608 of the Act as prohibiting transient rentals, but on the contrary had affirmatively construed the Act as permitting transient rentals provided that a rental charge per day of not more than one-thirtieth of the monthly approved rental charge was required of the transient tenants.

We further submit that such construction permitting transient rentals by those in charge of the Federal Housing Administration was a controlling and motivating factor in causing Congress to pass the 1954 Housing Act prohibiting transient rentals, but which Act by the very terms thereof condoned prior acts of the Commissioner in permitting transient rentals.

We further respectfully submit that since the record in this case overwhelmingly shows that the contemporaneous construction of Section 608 of the Housing Act by the Federal Housing Commissioner permitted transient rentals in projects such as The Darlington, Inc., the majority opinion must neces-

sarily have been reached without full appreciation of the facts set forth in the record.

SIXTH

The Court has overlooked the fact that, because of Constitutional limitations on any form of direct regulation, the charter of The Darlington, Inc., which does not prohibit transient rentals, constitutes a contract between the corporation and the United States which may not be varied by subsequent legislation nor regulation.

Upon reflection, we who represent The Darlington, Inc., feel that we failed in our Brief and argument before the Court to properly bring to the Court's attention the real issue in this case, and that it is our duty not only to our client but to this Court to do so even at the risk of being charged with trying to reargue the case in this Petition for Rehearing.

We feel that we were at fault for failing to make clear to the Court that the relationship between The Darlington, Inc., and the Commissioner is a contractual relationship measured exclusively by the terms of the charter of The Darlington, Inc., and the Commissioner's rights as preferred stockholder thereunder, and for failing to appropriately point out to the Court that the Government itself recognized and admitted this fact in its Brief in this Court as hereinatfer set forth.

We have already pointed out that Congress adopted the device of having the Commissioner become the holder of a special class of stock in Section 608 corporations in order to regulate such corporations, because Congress realized that it could not constitutionally regulate such corporations directly. We take it that Congress did so with full recognition of the long-established principle that a corporation's charter constitutes a contract between the corporation and each class of its stockholders, which neither the corporation nor any class

of stockholders may change without the consent of all, and also with full recognition that when a government becomes a stockholder in a private corporation, it divests itself of its sovereign character insofar as the transactions of that corporation are concerned.

This last-mentioned principle was thus enunciated by this Court in *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson*, 2 How. 497, 551, quoting with approval from *Bank of the United States* v. *The Planters' Bank of Georgia*, 9 Wheat. 904, 907, as follows:

> "[It is, we think, a sound principle,] that when a government becomes a partner in a trading concern, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

In accordance with this rule, the Commissioner's rights as sole preferred stockholder in The Darlington, Inc., are no greater than those of any private individual holding stock with identical preferences. Congress not having seen fit to reserve to the Commissioner the right to require Section 608 corporations to amend their charters so as to include subsequent regulatory provisions not included in their original charters, neither Congress nor the Commissioner can now do so, the present case being in this respect identical with *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, cited on page 58 of our original Brief.

We therefore respectfully submit that there is but one and only one real issue in this case—Did the provisions of the charter of The Darlington, Inc., prohibit transient rentals?

Because of the Constitutional considerations already mentioned, the statute itself provided that there was to be but one way in which the Commissioner could control the methods

of operation of a Section 608 insured project, as set out in Section 608 (b) (1) as follows:

> "***The Commissioner may, in his discretion, require such mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation. The Commissioner may make such contracts with, and acquire for not to exceed $100 stock or interest in any such mortgagor, as the Commissioner may deem necessary to render effective such restriction or regulation."

Pursuant to this statute, the regulations of the Commissioner provided that there was to be one way—and one way only—in which the Commissioner could exercise any control over the operation of a Section 608 insured corporation (24 C. F. R. 280.29):

> "A corporate mortgagor shall be regulated through the ownership by the Commissioner of certain shares of special stock***."

An examination of the regulations promulgated by the Commissioner in implementation of Section 608 discloses that they are concerned exclusively with establishing standards which must be met to make a mortgage eligible for insurance under Section 608 (24 C. F. R. Secs. 280.1 through 280.41 and 282.1 through 282.20). Up to the very moment when the Commissioner issued his endorsement insuring a mortgage, the Commissioner could require any prospective mortgagor, as a condition precedent to having its mortgage insured, to insert in its charter any additional regulatory provisions that he might deem desirable, but once the Commissioner issued his endorsement insuring the mortgage, such act constituted his acceptance of the preferred stock having such rights, and only such rights, as were set out in the particular charter, and from

and after that moment his rights, as well as those of the mortgagor, were forever fixed within the four corners of the mortgagor's charter of incorporation.

We submit that the Commissioner, in order to protect all parties and to eliminate any and all questions that might arise as to any party's rights, adopted and promulgated the following regulation (24 C. F. R. 282.19):

> "The regulations in this part may be amended by the Commissioner at any time and from time to time, in whole or in part, but such amendment shall not affect the contract of insurance on any mortgage already insured or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure."

The Appellant in its very Brief in this case, we submit, has admitted that any rights of control of the Federal Housing Commissioner over a corporation insured under the provisions of Section 608 are specifically limited to such rights as are found within the four corners of the charter provisions. We quote from Appellant's Brief, page 5:

> "In order to regulate the mortgagor, the Commissioner was to receive 'certain shares of [the mortgagor's] special stock' which would confer majority voting rights in the event of default under the mortgage, charter or any other agreement between the mortgagor and the Commissioner."

We quote also Note 7, page 9 of Appellant's Brief:

> "'This and all other powers afforded the Administration under appellee's charter result from the Administration's ownership of appellee's preferred stock."

Reference to the charter will show that consideration was given to the term of rentals of apartments in a Section 608 insured project and that there is no prohibition expressed or

implied against transient rentals. The only provision in the charter dealing with term of rentals will be found in Article Eighth (a) (1), which reads (Pl. Ex. 19; R. 184, 189):

> "Dwelling accommodations of the corporation shall not be rented for a period in excess of three years nor shall the property be rented as an entirety without prior written approval of the Preferred Stockholders."

As we have shown, there was no limit to the Commissioner's powers in reference to such regulatory provisions as he may have seen fit to impose through the provisions of the charter of any corporation insured under Section 608 of the Act. Likewise, a mortgagor could have accepted or refused a charter containing provisions that were objectionable. The simple facts in the present case are that the Commissioner imposed no restrictions against transient rentals in any provisions of the charter of The Darlington, Inc. The charter being a contract between the parties, under the decisions of this Court the Commissioner and everyone else are constitutionally barred from now imposing regulations against transient rentals. The provisions of the charter control and must prevail.

CONCLUSION

In view of the substantial constitutional and other issues involved in this case, and for the foregoing reasons and upon the foregoing grounds, the petitioner herein respectfully submits that this petition presents substantial issues overlooked by the majority opinion and not previously passed upon. In view of the import of the decision with its disastrous results to the petitioner and many others similarly situated, leaving the petitioner no relief or remedy of any kind at all, and in view of the unforeseen and far-reaching consequences of the decision and its effect upon those with whom the Federal Housing Administration has done or may hereafter wish to do

business, we respectfully submit that the Court will be amply justified in granting a rehearing of this case with time allocated for full argument.

J. C. LONG

W. TURNER LOGAN

HEMAN H. HIGGINS, JR.

Attorneys for Petitioner.

We, the undersigned attorneys for the petitioner above named, hereby certify that in our opinion the foregoing petition for rehearing is presented in good faith and not for delay.

J. C. LONG

W. TURNER LOGAN

HEMAN H. HIGGINS, JR.